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Supreme Court of the United States

OCTOBER TERM, 1964

PAN AMERICAN-GRACE AIRWAYS, INC., and BRANIFF AIRWAYS, INC., *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., and MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 1965

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing petitions for review of an order of the Civil Aeronautics Board that denied contemporaneous, comparative hearing and consideration of petitioners' applications for airline route licenses with the mutually exclusive application of Lufthansa German Airlines for a license to operate the same airline route.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 2025-43)[1] is not yet reported. It is set forth as Appendix B hereto, pp. 7a-23a, *infra*. The order of the Civil Aeronautics Board (J.A. 51-53) is not reported and is printed as Appendix C hereto, pp. 24a-26a, *infra*.

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on October 30, 1964. (R. 2045; App. D, p. 27a, *infra*). The order of the court denying petitioners' timely-filed petition for rehearing en banc was entered on December 11, 1964. (R. 2045-A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether United States air carriers, which have filed applications under Section 401 of the Federal Aviation Act for licenses to operate an international airline route, are entitled to contemporaneous, comparative hearing and consideration of their applications with the mutually exclusive application of a foreign air carrier under Section 402 of the Act for a license to operate the same airline route.

STATUTES AND EXECUTIVE AGREEMENT INVOLVED

The statute principally involved is the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.* Pertinent provisions of Sections 102, 401, 402, 801 and 1102 thereof are set forth in Appendix A hereto, pp.

[1] References "(R. ...)" are to the record of proceedings in the court below filed in this Court. References "(J.A. ...)" are to the page numbers of the joint appendix printed for the use of the court below, which is included in the record certified to this Court.

1a-4a, *infra*. Also involved are provisions of the Air Transport Agreement and Related Exchange of Notes Between the United States of America and the Federal Republic of Germany, July 7, 1955, 7 U.S.T. & O.I.A. 527, T.I.A.S. 3536, which are also set forth in Appendix A, pp. 5a-6a, *infra*.

STATEMENT

Petitioners Panagra and Braniff are United States flag air carriers that have routes down the west coast of South America. The route of neither carrier extends as far north as New York. The Braniff route terminates at Miami on the east coast of the United States and the Panagra route at Balboa, Canal Zone. Both petitioners participate in the provision of through-plane service between New York and South America by interchange arrangements with other carriers; these interchange flights make several intermediate stops. Each of the petitioners filed with the respondent Civil Aeronautics Board in 1962 an application for a license extending its route to New York by way of points that include Kingston and Montego Bay, Jamaica. (J.A. 113-15, 116-17). Those applications have been consolidated by the Board into the *United States-Caribbean-South America Investigation*, CAB Docket No. 12895, a major route case in which present-day air service needs between the United States and South America will be considered by the Board.

The Board's order instituting this investigation (J.A. 54-60) is familiar to this Court; it was printed as an appendix to the Court's opinion in *Pan American World Airways* v. *United States*, 371 U.S. 296, 314 (1963). In it the Board stated its tentative determination that the available traffic would support only one United States airline between the United States and

points on the west coast of South America. (J.A. 58; see J.A. 62). This determination was based upon an elaborate study by the Board's staff (J.A. 58; see J.A. 60-86), and in large part the lack of traffic potential for United States carriers was attributed to the services provided by foreign flag carriers operating between the United States and South America (J.A. 56; see J.A. 67-68, 79-86).

The hearings in this investigation are scheduled to be conducted this coming spring. Meanwhile, the Board on March 10, 1964, received an application from the respondent Lufthansa German Airlines for a license extending its route from New York to the very points in the Caribbean and South America for which Panagra and Braniff both are applicants: Kingston and Montego Bay, Jamaica; Quito and Guayaquil, Ecuador; Lima, Peru; and Santiago, Chile. (J.A. 5-7). Lufthansa already has routes linking South America and its home country, West Germany, but it has no authority to conduct operations between New York (a terminal of one of its routes from Europe to the United States) and points in the Caribbean or in South America.

Panagra and Braniff moved to consolidate Lufthansa's application and their applications for identical authority, alleging that the applications were mutually exclusive, *i.e.*, that because of the lack of sufficient traffic potential not all of the applications could be granted. (J.A. 21-27, 29-31). The Board denied these motions and set Lufthansa's application for expedited hearing. (J.A. 51-53; pp. 24a-26a, *infra*).

Panagra and Braniff filed petitions for review of the Board's order denying consolidation in the Court of Appeals for the District of Columbia Circuit under Section 1006 of the Federal Aviation Act, 72 Stat. 795, 49 U.S.C. § 1486. On petitioners' motions the court

stayed the Board proceedings on Lufthansa's application pending its final disposition of the petitions for review or until further order of the court. (R. 2046-48). A motion of Lufthansa to dismiss the petitions for want of jurisdiction was denied (R. 2049) as were subsequent motions of the Board and Lufthansa to dissolve the stay (R. 2050-52).

After briefing and argument a three-judge panel of the Court of Appeals decided, with Judge McGowan dissenting, that petitioners were not entitled to a comparative hearing with Lufthansa on their respective applications for licenses for the same airline route because the issuance of permits to foreign air carriers involves different considerations from those involved in determining whether certificates should be issued to United States carriers. Therefore, the court ruled, the Board's order deprived petitioners Panagra and Braniff of no legal rights and so it was non-final and non-reviewable, and the petitions were ordered dismissed. It was immaterial, on the view of the majority of the court, that the award of a permit to Lufthansa might in fact preclude, as a matter of economics, an award of a certificate to either or both of petitioners. (R. 2025-33; pp. 7a-13a, *infra*).

A petition for rehearing en banc was denied (R. 2045-A), and thereafter the Court granted petitioners' motion to stay transmission of its mandate to the Board pending this Court's action on a petition for certiorari to be filed on or before January 13, 1965.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the District of Columbia Circuit affects the administration of the Federal Aviation Act in an important class of cases before the Civil Aeronautics Board. The court

decided that Congress meant by key provisions of the Act to authorize the granting of a license to a foreign carrier to operate an airline route to the exclusion of citizen applicants for the same route without affording the citizen applicants a meaningful hearing on their applications.[2] The decision poses an important question of federal law that has not been and should be decided by this Court.

In the case of applicants for federal licenses generally the answer to the question posed in this case is provided by this Court's decision in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327 (1945). The doctrine established by that case is that where there are two or more applicants for licenses for the same authority, entitled as are petitioners and Lufthansa by the terms of the Federal Aviation Act to hearings on their applications, and there is, physically or economically, room for less than all of them, their applications must be heard and considered together.

> "[W]here two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333.

Petitioners' applications were filed under Section 401 of the Federal Aviation Act, and by an unbroken line of decisions of the lower federal courts there is no doubt that the right to a hearing conferred by that section ordinarily would entitle petitioners to the protection of the *Ashbacker* doctrine. *Delta Air Lines* v.

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[2] Petitioners are corporations. "Citizen of the United States" is defined by § 101(13) of the Federal Aviation Act to include a corporation organized under United States law of which the president and two-thirds of the board of directors are citizens and in which three-quarters of the voting interest is held by citizens.

CAB, 275 F. 2d 632 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 969 (1960); *Delta Air Lines* v. *CAB*, 228 F. 2d 17 (D.C. Cir. 1955); *Northwest Airlines* v. *CAB*, 194 F. 2d 339 (D.C. Cir. 1952); *Western Air Lines* v. *CAB*, 184 F. 2d 545 (9th Cir. 1950).

The majority of the court below decided that petitioners were not entitled to have their applications heard with Lufthansa's application because "quite different considerations bear upon Lufthansa's application and those of petitioners . . . ." (R. 2030; p. 11a, *infra*).

The court discussed the sources from which the difference in considerations was thought to arise. The first of these is an executive agreement concluded between this country and the Federal Republic of Germany in 1955. A schedule to the agreement provides for, among others, a route for a carrier designated by the German Government between Germany and cities in the United States including New York "and beyond to points in the Caribbean Sea and beyond to South America." (p. 6a, *infra*). The agreement is specific that the German carrier may be required to "qualify before the competent aeronautical authorities of . . . [the United States], under the laws and regulations normally applied by these authorities, before being permitted to engage in the operations contemplated by this Agreement." (Art. 3, p. 5a, *infra*).

"[T]he laws and regulations normally applied by" the Civil Aeronautics Board, which is the United States aeronautical authority referred to in the bilateral agreement, see Art. 1(a), p. 5a, *infra*, are set forth in Sections 402 and 801 of the Federal Aviation Act, which the court below next turned to. By Section

402 the Board "is empowered" to issue a permit to a foreign air carrier to operate over a route between this country and some other after notice and hearing and upon findings that the carrier is fit, willing and able to perform the transportation and to conform to applicable laws and regulations and that the transportation for which the permit is sought "will be in the public interest." Lufthansa's application was filed under Section 402. Section 801 makes a Board order granting (or denying) a foreign air carrier permit subject to the approval of the President.

Petitioners filed their applications pursuant to Section 401 of the Federal Aviation Act, which provides that after notice and hearing the Board "shall issue a certificate" granting the whole or any part of the authority sought in the application if it finds the applicant fit, willing and able to perform the transportation and to conform to applicable laws and regulations and that the transportation is required by the public convenience and necessity. Section 801 makes the President the final judge of whether petitioners' applications under Section 401 for certificates of public convenience and necessity covering routes extending beyond the United States should be granted, just as he is the final judge of whether Lufthansa's application under Section 402 for a public interest permit should be granted. No "different considerations" arise from the ultimate power of the President, then, because the situation is the same as to all three carriers.

Whatever "different considerations" there may be must derive from Section 1102 of the Act, which directs the Board to exercise its powers under the Act consistently with obligations assumed by the United States through treaty or executive agreement. It was ap-

parently this statutory provision, and the United States-German executive agreement describing in vague terms a route from New York to South America that a German carrier might seek to qualify to operate, that led the court below to say that the "public interest" test that must be satisfied by a foreign air carrier permit applicant under Section 402 differs from the test of the "public convenience and necessity" to which a United States airline is subject by Section 401. The fact is, however, that Section 102 of the Act directs the Board to consider the same factors both as being in the public interest and as being in accordance with the public convenience and necessity. The two phrases are interchangeable. See *United Air Lines Transport Corp.*, 1 C.A.A. 778, 779-80 (1940).

There is a difference between Section 402 and Section 401. By Section 402 the Board "is empowered," not directed, to issue a foreign air carrier permit when it finds the applicant fit and its proposed service in the public interest. By contrast, Section 401 provides that the Board "shall issue" a certificate to a citizen carrier when it makes the statutory findings concerning fitness and the public convenience and necessity. This is a quite natural Congressional direction that even a qualified foreign applicant ordinarily obtains its permit to carry passengers and freight in and out of the United States as a matter of grace, whereas the qualified citizen applicant is entitled to a certificate as a matter of right. The apparent significance of Section 1102 in this statutory scheme is that when the section is applicable, *i.e.*, when the route for which a permit is sought is the subject of an international agreement, the permit must be granted if the applicant satisfies the statutory criteria by proving at a hearing that it

is fit and that its service will be in the public interest. Section 1102 by its terms does not alter the governing public interest criterion.

Even if, however, the public interest test under Section 402 does differ in some way from the public convenience and necessity test under Section 401, as the court below believed, it does not follow that the Board may lawfully deny a citizen applicant a comparative hearing with a foreign applicant when their applications are mutually exclusive. A comparative assessment may be more difficult if the criteria are different, but it is the mutual exclusivity of applications, not the sameness of criteria, that entitles the usual license applicants to comparative hearing and consideration. *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945). The decision of the court below can be sustained, we submit, only if Section 1102 is construed to override altogether the public interest test of Section 402. The Board has denied that the provision is properly so construed. It has denied that Section 1102 means that a foreign air carrier permit shall be granted as in the "public interest" whenever the route for which the permit is sought is covered by an international agreement. *British-Overseas Airways Corp.*, 29 C.A.B. 583, 593 (1959).[3]

In any event, the question whether Congress meant that Section 1102 should have this effect, or that the provisions of law cited by the court below in combination mean that a foreign carrier's application can be

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[3] See also the quotation from the Board's brief in the court below set out in Judge McGowan's dissenting opinion: The Board said that it "considers that it is not required to recommend issuance of a foreign air carrier permit to the President merely because there is an agreement providing for such permit." (R. 2040; p. 20a, *infra*).

granted without United States carriers' having been heard on mutually exclusive applications, is appropriately one for resolution by this Court. This Court alone can authoritatively decide whether a foreign line's application can lawfully be granted without a domestic carrier's having had a meaningful opportunity to prove that it could perform the service needed on the route as well as the foreign line or better. The question is important as well as novel.

2. The court below cast its opinion and judgment in terms of jurisdiction, ordering the petitions for review dismissed. Its decision, however, was actually on the merits of the novel and important question of law we have just described. The court said that "in the conventional case deprivation of . . . [an *Ashbacker*] hearing to a party entitled thereto would have such aspects of finality as to be reviewable." (R. 2030; p. 11a, *infra*). An order effecting such a deprivation satisfies the test laid down by this Court in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1947), that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process."

"Under this test, a final order need not necessarily be the very last order." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 55 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954). Where only one of two license applications can be granted, an order refusing a comparative hearing to one of the applicants effectively denies him a substantial right. This makes it a final order for purposes of review. The court below dismissed for want of jurisdiction only because of its conclusion that, on account of differences in considerations arising from the statute, petitioners were not entitled

to a comparative hearing and therefore had not been deprived of any such right. The decision was on that question of law.

The court thus quite properly eschewed the basis on which the Board placed its order denying consolidation of the three applications. The Board, which held no hearing but decided the matter on pleadings, said that it was "not persuaded that grant of Lufthansa's application would, as a matter of economic fact, preclude the subsequent grant of Braniff's application." (J.A. 52).[4] The statement cannot be squared with what the

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[4] Among the reasons given by the Board for not being persuaded that there was in fact any mutual exclusivity was that "Lufthansa's schedules would be subject to the capacity provisions" of the agreement between the United States and Germany and that "Lufthansa would be required to tailor its capacity offered between the U.S. and South America to the traffic demands between Germany and the South American points in question." (J.A. 52). Capacity controls are chimerical. In a report that dealt at this point with the very provision of the United States-German agreement relied upon by Lufthansa, the Senate Interstate and Foreign Commerce Committee said that policing capacity

> "would ultimately reduce the level of frequencies to so low a number as to produce complaints of unfairness. Diplomatically, this would be difficult; *practically, it has never been done before.*
>
> "Our Government appears to have concluded that, once a route has been granted which is economically sustainable by the traffic moving between its termini because that is the most direct routing between those points, then the carriers should be left considerable freedom to operate the amount of capacity over that route to provide adequate service to the public. This is substantially the interpretation given by the CAB spokesman in his further testimony." S. Rep. No. 1875, 84th Cong., 2d Sess. 18-19 (1955). (Emphasis in original.)

Foreign air carriers have resisted, so far successfully, efforts to compel them even to *report* their traffic statistics to the Board. See British Overseas Airways Corp. v. CAB, 304 F.2d 952 (D.C. Cir. 1962); Initial Decision of Examiner Edward T. Stodola, CAB Docket No. 12063, June 21, 1962.

Board said in its order instituting the *South America Investigation.*

In that order the Board indicated that perhaps only one United States carrier should be authorized to serve the route from New York to the west coast of South America because of insufficient traffic in the markets involved. The Board attributed that problem in large part to services by foreign flag carriers over the route, saying:

> "Not only do these services rendered by non-U.S. flag carriers dilute the potential economic support for the services of the U.S. carriers, but also they bring into question the need for point-to-point duplication of such services." (J.A. 56).

There was thus at the very least a serious question of mutual exclusivity on the face of the Board's own prior findings. Ordinarily an applicant is entitled in those circumstances to attempt to sustain its allegation of actual mutual exclusivity in a comparative hearing. *Delta Air Lines* v. *CAB,* 275 F. 2d 632 (D.C. Cir. 1959), *cert. denied,* 362 U.S. 969 (1960); *Delta Air Lines* v. *CAB,* 228 F. 2d 17 (D.C. Cir. 1955). That was the view of Judge McGowan in dissent. He said that he considered the Board's order final and therefore reviewable because it "effectively put an end to petitioners' opportunity to press their claim of right to an *Ashbacker* determination, either on the record as it stood at the time the order was entered or after the receipt by the Board in the future of evidence on the exclusivity issue." (R. 2034; p. 15a, *infra*).[5]

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[5] This case does not involve any of the rules that agencies, particularly the Civil Aeronautics Board, have devised to channel *Ashbacker* claims in the interest of orderly procedure. There is no question of timely filing of competitive applications or motions to consolidate such applications, or of anything like a requirement that to avoid proliferation of issues an applicant for authority

Petitioners, to be sure, were admitted as intervenors in the proceeding on Lufthansa's application, but, as the court below said after reciting this fact, "denial of a comparative hearing with Lufthansa may preclude petitioners from showing economic superiority over Lufthansa in operating the route in question." (R. 2029; p. 10a, *infra*).

3. Petitioners do not believe that there are in this case any of the considerations that underlie this Court's holding in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1947). Section 1006 of the Federal Aviation Act, the judicial review provision of the Act, excepts from review in the courts of appeals "any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act. . . ." In the *Waterman* case this Court decided that orders affecting domestic air carriers' certificates subject to Presidential approval under Section 801 likewise could not be judicially reviewed.

The Board and Lufthansa urged below that the court lacked jurisdiction because, as it was put by the

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partially within and partially without the geographical confines of a major airline route case must substantiate in the course of the case his claim of mutual exclusivity with applications for authority between points wholly within the area covered by the proceeding. See Eastern Air Lines v. CAB, 271 F.2d 752, 756-57 (2d Cir. 1959), *cert. denied*, 362 U.S. 970 (1960); National Airlines v. CAB, 249 F.2d 13 (D.C. Cir. 1957). Here there is point-to-point duplication. Certainly after the decision of the court below that conclusive proof of mutual exclusivity would not entitle them to a comparative hearing, it would be futile for petitioners to attempt to make such proof in the Lufthansa application proceeding, even assuming that the Board would permit them to do so; it has never said that it would so permit them. *Cf.* National Airlines v. CAB, *supra* at 14-15.

Board, "ultimate decision in the Board's proceedings is committed to the President." Judge Wright, specially concurring below, accepted the contention. (R. 2033-34; p. 14a, *infra*). We do not believe that anything in the *Waterman* case requires that the exception from reviewability stated in Section 1006 be extended to include any order dealing with a foreign carrier permit or a certificate of public convenience and necessity for foreign air transportation even though that order is not subject to approval of the President. The court below at least assumed the correctness of our belief in *Seaboard & Western Airlines* v. *CAB*, 181 F. 2d 777, 779 (D.C. Cir. 1949), where it said that an order denying comparative consideration of mutually exclusive applications for international certificates would be reviewable. See also footnote 1 of Judge McGowan's dissenting opinion below. (R. 2035; p. 15a, *infra*).

If renewed here, the jurisdictional contention of the Board and Lufthansa would itself present a question meriting this Court's attention.

Petitioners' views on the question, in brief, are these: The order that is under review here was not subject to the approval of the President. It was not submitted to him or approved by him. It is fully effective without his approval. Of course, the ultimate decision whether Lufthansa should be awarded the permit it seeks or petitioners the certificates they seek is for the President. Petitioners simply seek to have placed before the Board for its recommendation to the President and before the President for his appraisal and decision their qualifications for operating the New York-South America route at the same time that Lufthansa's qualifications are presented. This they believe is their right

because of the likelihood the Board has found to exist that one or more of the applicants, for reasons of economics, cannot receive an award. For a court to direct that petitioners have this opportunity is not an intrusion into Presidential prerogatives or otherwise beyond judicial power. It is an exercise of the traditional judicial function of assuring fair play and a fair hearing, which is the genius of the *Ashbacker* doctrine.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

A. Pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, read as follows:

DECLARATION OF POLICY: THE BOARD

§ 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * *

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

§ 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Application for Certificate

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for a public hearing, and the Board shall dispose of such application as speedily as possible.

Issuance of Certificate

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * *

PERMITS TO FOREIGN AIR CARRIERS

Permit Required

§ 402. (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

Issuance of Permit

(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest.

Application for Permit

(c) Application for a permit shall be made in writing to the Board, shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall be regulation require.

Notice of Application

(d) Upon the filing of an application for a permit the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a permit. Such application shall be set for public hearing and the Board shall dispose of such application as speedily as possible.

* * *

THE PRESIDENT OF THE UNITED STATES

§ 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms,

conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

* * *

INTERNATIONAL AGREEMEENTS

§ 1102. In exercising and performing their powers and duties under this Act, the Board and the Administrator shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided,* That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

B. Pertinent provisions of the Air Transport Agreement and Related Exchange of Notes Between the United States of America and the Federal Republic of Germany, July 7, 1955, 7 U.S.T. & O.I.A. 527, T.I.A.S. 3536, read as follows:

ARTICLE 1

(a) The term "aeronautical authorities" shall mean in the case of the United States of America, the Civil Aeronautics Board and any person or agency authorized to perform the functions exercised by the Civil Aeronautics Board and, in the case of the Federal Republic of Germany, the Federal Minister of Transport and any person or agency authorized to perform the functions exercised by the said Federal Minister of Transport.

• • •

ARTICLE 2

(1) Each contracting party grants to the other contracting party rights necessary for the conduct of international air services by the designated airlines, as follows: the rights of transit, of stops for non-traffic purposes, and of commercial entry and departure for international traffic in passengers, mail and cargo at the points in its territory named on each of the routes specified in accordance with paragraph (2).

(2) The routes over which the designated airlines of the two contracting parties will be authorized to operate will be specified in a Route Schedule, mutually agreed upon, and set forth in an exchange of diplomatic notes.

ARTICLE 3

Air service on a specified route may be inaugurated by an airline or airlines of one contracting party at any time after that contracting party has designated such airline or airlines for that route and the other contracting party has given the appropriate operating permission. Such other party shall, subject to Article 4, be bound to give this permission provided that the designated airline or airlines may be required to qualify before the competent aeronautical authorities of that party, under the laws and

regulations normally applied by these authorities, before being permitted to engage in the operations contemplated by this Agreement.

* * *

The Secretary of State to the Chargé d'Affaires ad interim of the Federal Republic of Germany

Department of State
Washington

July 7, 1955

Sir:

I refer to paragraph 2 of Article 2 of the Air Transport Agreement between the United States of America and the Federal Republic of Germany, signed on July 7, 1955.

In the negotiations which have been conducted in connection with the above-mentioned Agreement, it has been agreed that air services may be operated in accordance with the following route schedule.

Route Schedule

* * *

B. An airline or airlines designated by the Government of the Federal Republic of Germany shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the United States of America at the points specified in this paragraph:

1. From the Federal Republic of Germany via intermediate points to Boston, New York and Philadelphia and beyond to points in the Caribbean Sea and beyond to South America.

* * *

For the Secretary of State:

Herbert Hoover, Jr.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18671

PAN AMERICAN-GRACE AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., LUFTHANSA GERMAN AIRLINES AND PAN AMERICAN WORLD AIRWAYS, INC., INTERVENORS

No. 18672

BRANIFF AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., LUFTHANSA GERMAN AIRLINES AND PAN AMERICAN WORLD AIRWAYS, INC., INTERVENORS

On Petitions for Review of an Order
of the Civil Aeronautics Board

Decided October 30, 1964

Before FAHY, WRIGHT and McGOWAN, *Circuit Judges.*

FAHY, *Circuit Judge:* Petitioners, Braniff Airways, Inc., and Pan American-Grace Airways, Inc., are domestic air carriers. They petition for review of an order of the

Civil Aeronautics Board denying a motion by Braniff, supported by Pan American-Grace, that an application previously made to the Board by Lufthansa German Airlines, intervenor, to amend its foreign air permit be consolidated with the pending United States-Caribbean-South American Investigation, known as the South American Route Case, or that the Board defer proceedings on Lufthansa's application until decision in the Route Case.

Petitioners moved in this court for a stay of the Board's proceedings in the Lufthansa case pending our review. We granted the stay. Lufthansa moved in this court that the petitions be dismissed. We denied this motion. Thereafter several American airlines which operate in the Federal Republic of Germany, herein referred to as Germany, and points beyond, under reciprocal rights granted in a bilateral Executive Agreement between the United States and Germany, were allowed to intervene or file briefs. The Master Executive Councils of Pilots of certain airlines were also allowed to intervene.

The motion before the Board to consolidate and defer, the denial of which is sought to be reviewed, was filed by Braniff as an intervenor in the case involving Lufthansa's application pursuant to Section 402 of the Federal Aviation Act, 72 Stat. 757, 49 U.S.C. § 1372 (1958), for an extension of its Europe to New York air route to points in South and Central America, in accordance with the bilateral Executive Agreement referred to. This Agreement grants to designated German carriers rights of transit in the United States, the specific routes to be set forth in an exchange of diplomatic notes.[1] Pursuant to this procedure the Secretary of State specified points in the United States and "points in the Caribbean Sea and be-

[1] Air Transport Agreement between the Federal Republic of Germany and the United States of America, Article 2, signed July 7, 1955. 7 U.S.T. & O.I.A. 527 (1956).

yond to South America."[2] The Agreement also requires the foreign carrier to qualify under the "laws and regulations normally applied" by the regulating body, the Board in this case.

The route sought by Lufthansa is essentially that involved in the Route Case. If its application were granted Lufthansa would serve substantially the same points as are presently served by petitioners, who are parties in the Route Case.

The Route Case grew out of a study by the Board staff which indicated that due to the economics of the situation, and because of foreign competition in the area, the public interest could be served more efficiently with newly designnated route patterns in place of routes presently operated by the two American airlines. Moreover, the Board has tentatively decided that only one American airline should operate from the United States to the western coast of South America; this route has several applicants including petitioners. The Route Case has spawned other issues, is very complicated, and hearings in the case will not begin until January 1965.

In support of its claim of right to consolidation and deferment Brainiff urges that comparative hearings are required under the *Ashbacker* doctrine, *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), since, it contends, the applications of petitioners and Lufthansa are mutually exclusive as a matter of economics. In denying the motion the Board said that assuming *arguendo* the doctrine were applicable "to this type of situation," the requisite showing of mutual exclusivity was not made, pointing out that Lufthansa's traffic along the South American route would be sharply restricted by the terms of the bilateral

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[2] Route Schedule made and agreed to by the Governments of Germany and the United States pursuant to Article 2 of the Air Transport Agreement. 7 U.S.T. & O.I.A. 527, 557 (1956).

Agreement. The Board also found no need to defer the Lufthansa application since it felt that public interest factors could be assessed without reference to the Route Case and because, as a matter of policy, foreign carrier applications should be expedited.

As intervenors before the Board petitioners will be able to submit evidence to the Board relating to Lufthansa's diversion of business from domestic carriers operating in the same area. But denial of a comparative hearing with Lufthansa may preclude petitioners from showing economic superiority over Lufthansa in operating the route in question.[3]

We think the petitions must be dismissed for lack of jurisdiction in this court. Our jurisdiction depends upon Section 1006 of the Act, set forth in the margin.[4] Though the action denying consolidation and postponement was by means of an order, reviewable orders do not, ordinarily, include such interlocutory or procedural orders:

> administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the ad-

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[3] Of course both petitioners will participate in comparative hearings in the Route Case, to which only domestic carriers are parties.

[4] Sec. 1006. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. 72 Stat. 795 (1958), as amended by 74 Stat. 255 (1960), 75 Stat. 497 (1961), 49 U.S.C. § 1486 (1958).

ministrative process. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299; *United States* v. *Illinois Central R. Co.*, 244 U.S. 82; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131.

Chicago & Southern Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

Petitioners contend that the order denying consolidation does deny them the substantial right to an *Ashbacker* hearing with Lufthansa. In the conventional case deprivation of such a hearing to a party entitled thereto would have such aspects of finality as to be reviewable:

> If the effect of the order denying consolidation in the case at bar were effectually to preclude Seaboard from rights which it otherwise would have, the order would be final as to Seaboard. It follows, as it frequently does in jurisdictional cases, for example, in the WJR case,[9] that we must consider and decide a portion of the controversy on the merits in order to determine whether we do or do not have jurisdiction.
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> [9] WJR, The Goodwill Station, Inc., v. Federal Communications Comm., 1949, 85 U.S.App.D.C. 392, 178 F.2d 720 (on mandate of Supreme Court).

Seaboard & Western Airlines v. *CAB*, 86 U.S.App.D.C. 9, 11, 181 F.2d 777, 779 (1949). And see *Delta Air Lines, Inc.* v. *CAB*, 97 U.S.App.D.C. 46, 49, 228 F.2d 17, 20 (1955); *cf. West Coast Exploration Co.* v. *McKay*, 93 U.S. App.D.C. 307, 318, 213 F.2d 582, 593 (1954).

Petitioners are not entitled to obtain review of the present order under the principle referred to, because they are not, in our view, entitled to an *Ashbacker* hearing with Lufthansa. Quite different considerations bear upon Lufthansa's application and those of petitioners in the Route Case. The bilateral Executive Agreement grants Germany the right to designate a carrier to operate air services to and from

> the Federal Republic of Germany via intermediate points to Boston, New York and Philadelphia, and

beyond to points in the Caribbean Sea and beyond to South America.[5]

The right thus claimed to be exercised on behalf of Lufthansa is reciprocal to the right under the Agreement granted to American domestic air carriers by Germany.

The manner in which the Federal Aviation Act dovetails into this situation is set forth in Sections 402 and 801. Under Section 402 a foreign air carrier may be granted a permit by the Board if it finds that the carrier is fit, willing and able properly to perform air transportation and to conform to the provisions of the Act, "and that such transportation will be in the public interest." 72 Stat. 757, 49 U.S.C. § 1372 (1958). Section 801 provides that the issuance or amendment of any permit to a foreign air carrier under Section 402 "shall be subject to the approval of the President." 72 Stat. 782, 49 U.S.C. § 1461 (1958).

From the foregoing it is seen that the obligation of the Board as an agent of the United States in connection with Lufthansa's application involves Presidential consideration of our international relations with Germany as they arise with respect both to Lufthansa and American domestic carriers operating abroad. Such considerations are not involved in the applications of petitioners, though the route sought by them and Lufthansa may be the same and the competition of each may be affected by the operations of the other.

Petitioners contend that the criteria set forth in Section 102 of "public interest," pertinent to foreign air carrier applications under Section 402, compels the Board to consider the same factors as are involved in determining the "public convenience and necessity" applicable to a domestic carrier under Section 401. But the public interest has many facets. Under Section 102 of the Act the Board

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[5] Supra note 2.

may consider other criteria than those therein specifically mentioned. And Section 1102 directs the Board to act consistently with obligations assumed by the United States in bilateral Agreements. We cannot carry the use of phraseology of similar character in the two sections to the point of overcoming the fact that the public interest involved in our obligations under the bilateral Agreement cannot be equated with the public convenience and necessity referred to in Section 401.

The public interest factors to be considered in cases arising under Section 401, including the Route Case, are primarily economic. Where the public interest referred to in Section 102 is to be considered, and superiority in one or more of the public interest factors is relevant to the grant of an application, an *Ashbacker* hearing insures an element of fairness in choosing among mutually exclusive applications. But neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings. In the Lufthansa case, comparative considerations, bearing primarily upon economics, would do little to dilute the public interest factor which perhaps weighs most heavily, that is, the policy and obligations of the United States set forth in the bilateral Agreements.

Under this view of the case we do not reach the issues of mutual exclusivity or of alleged absence of findings of fact to support the Board's order. We hold only that since petitioners are not entitled to an *Ashbacker* hearing, the order remains interlocutory and non-reviewable.

The avenue open to petitioners through their permitted intervention in the Lufthansa case before the Board cannot now be said by us to be so restricted that petitioners will be precluded from making available to the Board, and through the Board to the President, such matters affecting the public interest as will meet the requirements of due process of law.

Dismissed for lack of jurisdiction.

WRIGHT, *Circuit Judge, concurring*: I concur in the court's opinion.

These proceedings, in my judgment, are an attempt, by the carriers now enjoying the international routes in suit, to frustrate executive action by this Government with respect to its contract obligation to the West German Government. I agree that neither this court nor the Board should be a party to it. As the Secretary of State [1] suggests, to throw Lufthansa's application into the pending United States-Caribbean-South America investigation, the so-called South America Route case, would delay—probably for years—executive action implementing the agreement. It was precisely to prevent this type of embarrassment to the conduct of our foreign affairs that the Congress denied judicial appeal from Board action on international routes. 72 STAT. 795, 49 U.S.C. § 1486(a). See *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). What this court said in *British Overseas Airways Corp.* v. *CAB.*, 113 U.S.App.D.C. 76, 77, 304 F.2d 952, 953 (1962), is applicable to this case: "The prohibition [against appeal] cannot be circumvented by the expedient attempted here."

McGOWAN, *Circuit Judge, dissenting*: My respectful disagreement with the majority in this case extends both to

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[1] In his letter to the Attorney General with respect to this case, the Secretary of State states, in part:

> "It is our view that any substantial delay in the processing of Lufthansa's application, whether for a period of months or years, will severely compromise our interational aviation relations and will impair our ability to negotiate effective exchanges of air routes with other countries. Doubt would be cast on our reliability in complying with the obligations set forth in our bilateral agreements; the value of route grants by the United States to foreign carriers would be significantly reduced; and the operations of our carriers over routes granted by foreign countries would be subjected to dilatory or other retaliatory measures."

the merits of the order in question and our jurisdiction to review it. The court, working back from its conclusion on the merits, finds that it is without jurisdiction. There are, of course, situations in the law where this must be the order of inquiry. In my view, this is not one of them. Had I agreed with my colleagues on the merits, I still would have thought the order properly before us.

The reviewability of this order depends in the first instance upon its finality, and, secondarily, upon whether the Congress has, in Section 1006(a) of the Federal Aviation Act, expressly forbidden review of the order as one "subject to the approval of the President." The majority opinion appears to me to assume finality in the coventional sense, provided that petitioners in fact have an *Ashbacker* right. The difference may not be too important in terms of result here, but my own thought is that finality attaches in this case because the order effectively puts an end to petitioners' opportunity to press their claim of right to an *Ashbacker* determination, either on the record as it stood at the time the order was entered or after the receipt by the Board in the future of evidence on the exclusivity issue. The *Ashbacker* claim was hardly frivolous; and, thus, the order was appropriate for review, even though petitioners might be unable to establish their *Ashbacker* contentions to our satisfaction.

Section 1006(a) here contributes to finality.[1] It is urged upon us that petitioners could have submitted evidence

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[1] The order under review represents a procedural determination as to how certain applications are to be handled. It decides nothing with respect to the merits of the applications. Whether or not it is properly regarded as final rather than interlocutory for judicial review purposes, it does not constitute an order "subject to the approval of the President" within the reach of Section 1006 (a). That category is reserved for orders of the Board which are inextricably intertwined with the merits of the grant or denial of applications. Congress cannot be taken to have intended that the President pass upon the various procedural orders

on exclusivity in the hearings to be held upon the merits of Lufthansa's application and then argued to the Board for an alteration of its procedure in the light of such evidence. But certainly one outcome of the Section 402 hearing can be an order granting the application. That order would be one clearly subject to Presidential discretion; judicial review would be out; and petitioners would presumably be left only with a strong personal conviction of the justice of their *Ashbacker* position. The finality of administrative orders, for purposes of amenability to judicial review, is a highly practical concept. It derives meaning only from the immediate context. In the distinctive concatenation of circumstances in which petitioners found themselves upon the entry of the order before us, I have no doubt that they could seek relief here and that we were warranted in hearing them out, even though we might ultimately disagree with what they said.

However, I do not so disagree. I take *Ashbacker* to mean the following: Where a licensing agency has before

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made by the Board in the course of moving towards a recommendation on the merits. I do not find *British Overseas Airways Corp v. CAB*, 113 U.S.App.D.C. 76. 304 F.2d 952 (1962), to be to the contrary. There the Board initiated a proceeding looking toward the promulgation of a proposed regulation amending the conditions upon which a foreign air carrier permit was to continue to be held. The carrier's motion to dismiss the proceeding was denied, and review was sought here of that order. This court thought such review was barred by Section 1006(a), for the reason that the conditions upon which foreign air carrier permits are to be granted or withheld is ultimately a matter committed to the President's sole discretion. The court felt that it could not review the Board order in question without getting into the area of Presidential discretion. *BOAC* did not involve a claim of unfairness in respect of a procedural determination; it involved substantive issues, the resolution of which by this court would inevitably impinge upon the role assigned to the President by Congress. Conversely, how the Board schedules its hearings in this case does not infringe in any way upon the President's latitude of action in determing whether, or upon what conditions, to grant Lufthansa's application.

it at any one point in time two applicants for a grant which surrounding circumstances indicate strongly can justifiably be made only to one, it is not to go ahead and decide for the one before it hears the other. To do otherwise, said the Supreme Court, "may satisfy the strict letter of the law but certainly not its spirit or intent," and "deprives the loser of the opportunity which Congress chose to give him." These procedural limitations in the interest of fair hearing have been accepted as fully applicable by this court to applications by domestic air carriers under Section 401 of the Federal Aviation Act.[2] The question we now face is whether they also apply when the Board has before it apparently conflicting applications under Section 401 *and* Section 402, the latter being the provision made by Congress whereunder foreign air carriers, as distinct from United States flag lines, may seek authority to fly between the United States and foreign countries.

Although the foregoing is, I believe, an accurate formulation in general terms of the issue to be decided, it is the part of caution to bear in mind that the resolution of any *Ashbacker* problem cannot be divorced from the peculiar facts giving rise to it. This Court has said in *Delta* that *Ashbacker* is "a rule of substance and not a mere prescription of form," noting that the Supreme Court in its initial formulation avowed its concern to be with the "practicalities" of the particular case before it. 97 U.S.App.D.C. 46, 50, 228 F.2d 17, 21 (1955). Fair hearing in the administrative area is nothing if not a fluid concept, with its contours changing from case to case in accordance with the realities confronting the parties. The central reality faced by petitioners here is the Board's view, announced

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[2] *Delta Air Lines, Inc.* v. *CAB*, 97 U.S.App.D.C. 46, 228 F.2d 17 (1955). See, also, *Delta Air Lines, Inc.* v. *CAB*, 107 U.S.App.D.C. 174, 275, F.2d 632 (1959), *cert. denied*, 362 U.S. 969 (1960), and *Northwest Airlines, Inc. v. CAB*, 90 U.S.App.D.C. 158, 194 F.2d 339 (1952).

in its order initiating an investigation of the Latin American route situation, that the proliferation of foreign air carriers on the route served by petitioners appeared to make it desirable for one of them to have its route extended to New York and for the other to be eliminated. It is against this backdrop that one more in a long line of foreign carriers presents itself to the Board with a Section 402 application to serve the New York-South America route. The Board schedules that application for prompt hearing and presumably prompt disposition. It tells petitioners that their applications for single-line service from New York to Latin America will be heard later. [3]

I do not understand my colleagues as questioning the substantial, as distinct from the merely formal, impact of this proposed procedure upon petitioners. Their disposition not to interfere with the course the Board has determined to follow rests upon two foundations. One is essentially the idea that Congress did not intend that the Board, in considering an application by a foreign air carrier under Section 402, should concern itself with the effects of the granting of that application upon a domestic line currently seeking authority under Section 401 to serve the same route. This position seems implicit in the opinion's early reference to "the obligation of the Board as agent of the United States in connection with Lufthansa's application involves Presidential consideration of our international relations with Germany as they arise with respect both to

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[3] Some chronology may help to put the legal issue before us in perspective. The Board's order initiating an investigation of petitioners' routes and certificates was entered August 8, 1961. In response to what that order foreshadowed, petitioners filed applications to extend their service to New York in June and September, 1962, respectively. Lufthansa's application was filed February 27, 1964. This last application was set down for hearing to commence June 10, 1964, whereas petitioners were told that their applications would not be reached for hearing before January of 1965. The hearing for Lufthansa has been stayed by this court pending this appeal.

Lufthansa and American domestic carriers operating abroad." If "abroad" here is read as "Germany," as I think may fairly be said to be its import, the thesis seems to be that the Board has no significant aspect of the public interest to weigh under Section 402 other than that of the possible harm to be done to our international aviation interests in Germany if this application is denied. The implication is that to take a broader view of the public interest would be to countenance repudiation or frustration of the Executive purposes in entering into the 1955 agreement with the German Federal Republic.

The President cannot, of course, be repudiated or frustrated if he chooses not to be, since he is empowered by the statute, for any or no reason and without exposure to judicial scrutiny, to direct the Board to issue the requested authority to Lufthansa, despite any recommendation the Board might make to the contrary. But the argument seems to be that the Board was not intended by Congress to waste its time in an inquiry which might conceivably lead the Board to be so presumptuous as to recommend in the public interest a course of action contrary to that contemplated by an executive agreement. A President who had not negotiated the agreement in question, and a Congress which has no function with respect to the approval or disapproval of executive agreements, might each be of the view that the Board's conception of the entire public interest at any one point in time would be a useful element in the President's store of knowledge as he turns to the discharge of his responsibilities under Section 801.

Now there is no question but that our international relations are a highly important factor for the Board to take into account under Section 402. But it is not the only one, nor is there to be attributed to it, in my view, the almost overpoweringly dominant role contemplated by the majority opinion. It would have been very easy for Congress to make plain its purpose to make it so, if such purpose it had. Section 402 could clearly have said that,

where the President has made a commitment to another sovereign nation that a national of the latter designated by it shall be permitted to serve the United States, the only issue before the Board upon such an application is the fitness, willingness, and ability of the designee to provide the service and to observe our regulatory laws and regulations. Section 402 presently says as much. It also says more, namely, that the Board is to find, further, that the "transportation will be in the public interest."

Throughout I follow only the Board's reading of the statute. Its own concept of what it may do in passing upon an application under Section 402 is set forth at pp. 7-8 of its brief. A fair summary is as follows: Despite the provisions of Section 1102, directing the Board to act "consistently" with any international commitment, the Board "considers that it is not required to recommend issuance of a foreign carrier permit to the President merely because there is an agreement providing for such permit." The Board receives evidence in respect of each of the various standards set forth in Section 402. As to that of the public interest, it "normally" regards the predominant issue to be that of whether the application should be granted because of reciprocity considerations. But where it is asserted that the grant will be injurious to U.S. carriers, "hence contrary to the public interest," it weighs that adverse impact against the reciprocity benefits, and submits its findings and conclusions to the President so that "he has the benefit of the Board's views in determining what his action should be." The existence of a bilateral executive agreement is, in the Board's view, a "*prima facie* public interest factor pointing to the grant," and a "strong showing would be required to warrant a recommendation to the President that the application should be denied and the bilateral denounced."

This all seems to me to say that one who hopes to persuade the Board to recommend to the President the denial of a foreign air carrier permit contemplated by an execu-

tive agreement has something of an uphill road. But the way is there if he can make it, and the Board will, upon a "strong showing," tell the President that it believes the time has come to deny the permit and to denounce the agreement. I do not understand petitioners to be under any illusions as to the difficulties they face, or to be complaining about them. Their claim is, rather, that fair hearing comprehends the opportunity to mount the attack on a scale commensurate with the barrier to be breached.

With the relevant standards prescribed as stated above, Section 402 directs that public notice be given of the application, and that a public hearing be held, with participation in the latter contemplated to be accorded to "any interested person." The Board in this case has recognized its obligation in the latter respect by permitting the intervention of petitioners in the Section 402 hearing, and it tells us that it will receive evidence from them. But the Board also tells us that, by reason of the narrower scope which it places upon the concept of "public interest," petitioners will be limited in their showing to representations of the adverse economic effect upon them and, that upon a record so confined, the Board will proceed to formulate and transmit its recommendation to the President before it turns to the more leisurely labor of hearing petitioners' applications. My colleagues say in substance, and as the second base of their holding, that, even if the Board be deemed to be something more than a mere agent of the President in his conduct of our international relations with Bonn, this restricted hearing which the Board proposes to give petitioners is amply adequate to the objectives which Congress subsumed under the rubric of "the public interest."

Absent a more precise definition of that term than Congress has given us, I am not convinced that this is so, nor that the shadow of *Ashbacker* does not fall squarely across the procedure the Board has in prospect for the handling of these applications. The concept of the "pub-

lic interest," when used in a public utility licensing statute, immemorially and customarily comprehends, among others, such things as which of two or more competing applicants can render the best and cheapest service to the public. Until Congress says plainly that a consideration of this kind is not to enter into the exploration of "public interest" as that term is used in Section 402, I am disabled from saying that it is irrelevant. The Board, however, does not intend to afford petitioners an opportunity to make the affirmative case in support of their own applications until after its recommendation with respect to Lufthansa has gone to the President. By the time the Board hears, decides, and makes recommendations to the President with respect to petitioners' applications, the additional service provided by Lufthansa may be the last straw on the economic back which compels the Board to effectuate its preliminary determination that the market will not support both Panagra and Braniff. What consolation would there then be for petitioners, or for the travelling public, in the knowledge that both petitioners had demonstrated by affirmative evidence their ability to furnish a better and cheaper service than the foreign carrier? Is it conceivable that Congress intended that the President should know that before he acted on any of the Board's recommendations?[4]

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[4] The President has, of course, an absolute and unreviewable discretion to do as he pleases, and without stating his reasons, in accepting or rejecting the Board's recommendations in respect of international routes. What petitioners seek here, however, is a meaningful chance to try to persuade the Board that its recommendations to the President should be one way rather than another. That is not an insubstantial privilege, as anyone knows who is familiar with the phenomenon in large organizations of first-draft inertia. The Board is made up of Presidential appointees, presumably chosen for their expertise and because the President has confidence in their judgment. It is not to be assumed that a course of action recommended to the President by the Board is without significant weight in his deliberations.

I do not, of course, intimate any opinion that petitioners can in fact make such a showing. We are concerned here, however, with the scope and timing of administrative hearings, and not with their likely result. The Supreme Court in *Ashbacker* was not motivated by any conjecture that the aggrieved applicant would probably prevail if he could only stave off decision until the merits of his case were before the agency. It was impelled to the result it reached by its divination of the sense of Congress as to what would constitute a fair hearing under the special circumstances there present. I am not persuaded that the problem here arises in a setting so different as to justify a contrary appraisal of the legislative will.

Had the Board elected to follow a different plan and to hear both the 401 and 402 applications before making its recommendations to the President as to each, I doubt that a protest by any one of the applicants would be regarded by us as presenting any serious legal problem. What is argued in substance to us now by the Board is that it cannot so elect because it will take it too long to hear and pass upon petitioners' applications; and that the resulting delay will embarrass the President and the Secretary of State in their conduct of our relations with Germany. But *Ashbacker* appears to me to contemplate some delay as a price Congress was willing to pay for fairness; and there is nothing in this record demonstrating utter incapacity in the Board to minimize the asserted embarrassment to the Executive by proceeding to hear and determine these applications with greater dispatch than has perhaps been characteristic of major route proceedings in the past.

APPENDIX C

Order No. E-20794

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 15073

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 6th day of May, 1964

DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT
(Lufthansa German Airlines)

Order

This proceeding involves the application of Lufthansa German Airlines (Lufthansa) for amendment of its foreign air carrier permit to extend its route beyond New York to Santiago, Chile, via the intermediate points Montego Bay, Jamaica; Kingston, Jamaica; Quito, Ecuador; Guayaquil, Ecuador; and Lima, Peru.

Braniff has filed a motion requesting that Lufthansa's application be deferred pending decision in the *United States - Caribbean - South America Investigation*, Docket 12895, (hereinafter referred to as the *Route Case*)—or, in the alternative, that Lufthansa's application be consolidated with that case for decision. Answers in support of Braniff's motion have been filed by Panagra and the Master Executive Councils of Pilots of Braniff, Panagra, and Pan American. Answers in opposition to Braniff's motion have been filed by Lufthansa and Bureau Counsel.

Braniff alleges that (1) the public interest factors inherent in the 402 permit case cannot be fairly weighed until a decision has been reached in the *Route Case* as to future U.S. authority in the markets in issue, (2) the competitive impact of Lufthansa's operations cannot be known or controlled, and the bilateral agreement cannot be com-

plied with, until the scope of the U.S. carrier operations has been resolved in the *Route Case,* (3) the bilateral agreement under which Lufthansa is seeking fifth freedom rights may have been improvident and should perhaps be revised, and (4) under the Ashbacker doctrine, deferral of Lufthansa's application is required as a matter of law.

Upon consideration of the pleadings and all the relevant facts, we have decided to deny Braniff's motion. Assuming, *arguendo,* that the *Ashbacker* Doctrine is applicable to this type of situation, there is no showing that the Braniff and Lufthansa applications are mutually exclusive as a matter of economics. Lufthansa's traffic in the markets for which Braniff has applied would constitute fifth freedom traffic for the German carrier, and Lufthansa's schedules would be subject to the capacity provisions of the bilateral agreement. Pursuant to the bilateral agreement, Lufthansa would be required to tailor its capacity offered between the U.S. and South America to the traffic demands between Germany and the South American points in question. As a result, Lufthansa's operations would not be primarily designed to accommodate the needs of New York-South American traffic, and its ability to compete with unrestricted carriers would be sharply restricted. In view of the foregoing, we are not persuaded that grant of Lufthansa's application would, as a matter of economic fact, preclude the subsequent grant of Braniff's application.

Moreover, we find no warrant for deferring Lufthansa's application pending decision in the *Route Case.* Assuming that the route pattern which finally emerges in the *Route Case,* is different from that which presently obtains, it does not follow that Lufthansa's application must await future resolution of the *Route Case.* The public interest aspects of the foreign air carrier application including the question of diversion from U.S. carriers can be adequately tested in the light of the existing service pattern. It is true that the competitive impact of Lufthansa's services may change

if the South American route pattern changes. However, Braniff has assigned no persuasive reasons why Lufthansa's application cannot be appraised in the light of present day circumstances. To the contrary, Braniff's arguments are addressed, for the most part, to the merits of the foreign carrier's application. Finally, we note that deferral or consolidation of Lufthansa's application would be inconsistent with both our statutory mandate to dispose of foreign air carrier applications as speedily as possible, and our express policy of giving expedited treatment to such applications.

In view of the foregoing, Braniff's motion will be denied.

ACCORDINGLY, IT IS ORDERED:

That the motion of Braniff to defer or, in the alternative to consolidate Lufthansa's application with the *Route Case* for decision, be and it hereby is denied.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1964

No. 18671

PAN AMERICAN-GRACE AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

• • •

No. 18672

BRANIFF AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

• • •

Judgment

These cases came on to be heard on the record from the Civil Aeronautics Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that these cases are hereby dismissed for lack of jurisdiction.

Per Circuit Judge Fahy.

Dated: October 30, 1964

Separate concurring opinion by Circuit Judge Wright.

Separate dissenting opinion by Circuit Judge McGowan.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 29 1965
JOHN F. DAVIS, CLERK

No. 824

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PAN AMERICAN—GRACE AIRWAYS, INC. and BRANIFF AIRWAYS, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., and MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., and PAN AMERICAN—GRACE AIRWAYS, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT LUFTHANSA GERMAN AIRLINES IN OPPOSITION

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January 29, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT LUFTHANSA GERMAN AIRLINES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A to the Petition, pp. 7a-23a. The order of the Civil Aeronautics Board is printed as Appendix C to the Petition, pp. 24a-26a.

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on October 30, 1964. (R. 2045; App. D, p. 27a to the Petition). The order of the court denying petitioners' petition for rehearing en banc was entered on December 11, 1964. (R. 2045-A). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board must set for comparative hearing an application of a foreign air carrier for a specific international route with hearings in a pending, comprehensive route investigation case in which the Board will determine the route structure of several United States citizen air carriers for the area wherein the specific international route is located, where the United States has, by executive agreement antedating the filing of all relevant applications, agreed to grant the route applied for by the foreign air carrier to the country of which such carrier is a national.

2. Whether an order of the Board denying a motion for such comparative hearing is subject to judicial review.

STATUTES, REGULATION, AND EXECUTIVE AGREEMENT INVOLVED

Some pertinent provisions of the statute principally involved, the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 et seq. are set forth in the Petition (pp. 1a-4a). Other pertinent provisions of Sections 101; 401; 402; 406-409; 415; 416; 501; 503; 802; and 1006 are set forth in Appendix A, pp. 1a-10a, to

this Brief. The Regulation involved is the Standardized Government Travel Regulations, Bureau of the Budget Circular No. A-7, some pertinent provisions of which are set forth in Appendix A, p. 10a, to this Brief. The Executive Agreement involved is the Air Transport Agreement Between the United States of America and the Federal Republic of Germany, July 7, 1955, 7 U.S.T. & O. I. A. 527, TIAS 3536. Articles thereof are set forth in Appendix A, pp. 5a-6a of the Petition; additional articles and the entire Exchange of Notes pursuant to the Agreement are set forth in Appendix B, pp. 11a-16a, to this Brief.

STATEMENT

On July 7, 1955, the United States and Germany entered into a bilateral agreement providing for the exchange of air routes between the two countries. (J.A. 8-19). By Exchange of Notes dated the same day, each country secured three routes for its carriers. Germany agreed to give the following routes to carriers chosen by the United States: (1) from the United States via intermediate points to Hamburg and beyond to points in Europe north and east of Germany; (2) from the United States via intermediate points to Dusseldorf-Cologne/Bonn, Frankfurt, Stuttgart and Munich and beyond to points in Europe east and southeast of Germany and beyond; and (3) from the United States via intermediate points to Frankfurt and beyond to points in Europe south and southeast of Germany and beyond to North Africa, the Near East, and beyond. (J.A. 19). The United States agreed to give the following routes to carriers chosen by Germany: (1) from Germany via intermediate points to Boston, New York, and Philadelphia and beyond to points in the Caribbean and beyond to South America; (2) from

Germany via intermediate points to Chicago; (3) from Germany via intermediate points to San Francisco or Los Angeles (the choice to be made by Germany). (J.A. 20). Thus under the route exchange United States carriers were given the right to compete with German carriers from specified points in Germany beyond to points in Europe north, east, south and southeast of Germany and to points in Asia, North Africa, the Near East, and beyond. German carriers were given the right to compete with United States carriers from specified points in the United States to points in the Caribbean and South America. (J.A. 19-20). Competition for traffic beyond the homeland of the granting State was not, however, unlimited: under Article 10 of the Agreement, an airline was required to provide capacity adequate to traffic demands between the country of which the airline is a national and the countries of ultimate destination of the traffic (Appendix B, pp. 12a-13a; J.A. 19-20; J.A. 13). In concrete terms, a United States carrier could not gear its capacity, i.e., provide sufficient seats, for all the traffic between Frankfort and the Middle East, but must relate its capacity to the traffic between the United States and the Middle East; similarly, German capacity for New York-South American traffic was limited to the capacity necessary to transport passengers traveling between Germany and South America.

On February 27, 1964, Lufthansa German Airlines (Lufthansa) filed an application, under Section 402 of the Federal Aviation Act, for an amended foreign air carrier permit, requesting authority to operate beyond New York to points in Jamaica, Ecuador, and the terminal point, Santiago de Chile (J.A. 5-7).[1] At-

[1] Prior to the filing of this application, Lufthansa had been operating under a foreign air carrier permit from Germany to New York (J.A. 6).

tached to the application was a note from the German Embassy to the State Department referring to and reaffirming its earlier designation of Lufthansa as the German carrier to operate the first route granted in the bilateral to German carriers, including that portion of the route beyond New York to South America (J.A. 21). The Lufthansa application was docketed and set for hearing (J.A. 46-50). Braniff Airways, Inc. (Braniff), Pan American—Grace Airways, Inc. (Panagra), Pan American World Airways, Inc. (Pan Am) and The Master Executive Councils of Pilots of Braniff, Panagra, and Pan Am (the Pilots) were granted leave to intervene (J.A. 44-45).

Prior to the date set for hearing, Braniff and Panagra, who, under separate interchange agreements with other carriers, currently provide one plane service between New York and points on the West Coast of South America (Pet. p. 3), moved to defer all proceedings on Lufthansa's application until a decision had been rendered in a proceeding entitled *United States - Caribbean - South American Investigation (Route Case)*, Docket 12895. In the alternative, Braniff and Panagra moved that Lufthansa's application be consolidated with the *Route Case* for decision (J.A. 21-27; 29-31). Whatever other consequences the deferral or, in the alternative, consolidation, would have entailed, it is certain that grant of the motion in either form would have resulted in deferring the Board's recommendation to the President on the Lufthansa application for a number of years. The *Route Case* has been pending since 1961; petitioners' applications for amended certificates in the U.S.-South American market have been on file since 1962; and hearings are not scheduled in that case on the petitioners' appli-

cations—as well as on the competing applications of other U.S. citizen air carriers (J.A. 97-112)—until the spring of 1965. (Pet. p. 4). Early decision in the *Route Case* is impeded not only by the complexities of that very proceeding, but by the fact that a related case—Panagra-Pan American Grace Investigation (See *Pan American World Airways* v. *United States,* 371 U.S. 296 (1963)) may have to be decided either before or contemporaneously with the *Route case* (J.A. 91-92).[2] Thus the practical relief sought by Braniff and Panagra was a deferral of any recommendation to the President regarding Lufthansa's application for several years.

On May 6, 1964, the Board denied Braniff's and Panagra's motion on several grounds: (1) Lufthansa must, by the terms of the bilateral agreement, limit its capacity to the traffic demands between Germany and South America, and therefore its operation cannot exclude a U.S. carrier's application which is geared to the traffic demands between the United States and South America; (2) Braniff and Panagra may, as intervenors, introduce any evidence on the public interest question in the Lufthansa proceeding; and (3) the substantial delay contemplated by the motion in the processing of Lufthansa's application would violate the Board's statutory duty and its policy of processing without delay foreign air carrier applications (J.A. 51-53).

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[2] As the decision in the Court of Appeals stated: "The Route Case has spawned other issues, is very complicated, and hearings in the case will not begin until January 1965." (Hearings have now been postponed until April 20). Petitioners themselves state (Petition, p. 3) that the Route Case is a "major route case in which present-day air service needs between the United States and South America will be considered by the Board."

On June 5, 1964, petitioners filed petitions for review in the Court of Appeals for the District of Columbia Circuit, and motions for an interlocutory injunction to restrain the Board from holding the hearings scheduled on the Lufthansa application. The motions for interlocutory injunctions were granted and the Court of Appeals ordered the parties to agree on an expedited briefing schedule (R. 2046-2048).

On July 1, 1964, Lufthansa and the Board filed motions to dissolve or modify the stay (R. 2079-2096A). Attached to the Board's motion was a letter from the Secretary of State to the Attorney General explaining the interest of the Department of State in securing a dissolution of the injunction, and urging the Attorney General to support the Board's motion (R. 2084-2086). The letter said, in part:

> "So long as the agreement remains in effect, the United States cannot, in our view, be put in the position of telling a foreign country with which we have an international agreement that the question of whether the United States will comply with the agreement must be deferred for a period of years, pending consideration of long-range plans for operations by United States flag carriers." (R. 2085)

The three U.S. citizen air carriers who are designated by the United States to serve the routes granted under the U.S.-German bilateral—Trans World Airlines Inc., (TWA) Seaboard World Airlines, Inc. (SWA) and Pan American World Airways, Inc.—moved for leave to intervene in support of the motions to dissolve the injunctions. The Court granted Pan Am's motion to intervene, and allowed TWA and SWA to file joint-brief as amici curiae (R. 2102).

On September 30, 1964, the motions for dissolution or modification were denied (R. 2050-2052) One month later, the Court dismissed Braniff's and Panagra's petitions for review. The Court held that Braniff and Panagra were not entitled to a comparative hearing with Lufthansa, and hence the Board order deprived Braniff and Panagra of no rights, and was not final. The Court dismissed the petitions for lack of jurisdiction (Pet., p. 13a).

The Court found that the hearings required for applications by citizen carriers under Section 401 of the Act involve different issues than those required for applications by foreign carriers, pursuant to bilateral agreements, under Section 402 of the Act (Pet., p. 12a). Whereas in hearings held on petitioners' applications for the South American route under Section 401, the decisional public interest factors will be economic, in Lufthansa's hearing under Section 402, the decisional public interest factor will be the bilateral agreement. (Pet., p. 13a). And, the Court said, "neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings." (Pet., p. 13a). The Court further found that petitioners' due process rights may be fully protected by their opportunity to submit for Presidential consideration in the Lufthansa proceeding any considerations bearing on the public interest (Pet., p. 13a).

Judge Wright concurred in the Court's opinion, and filed a separate opinion, stating that review of the Board's order was precluded by Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a). Judge Wright cited the Secretary of State's letter to the Attorney General, and said that "It was precisely to

prevent this type of embarrassment to the conduct of our foreign affairs that the Congress denied judicial appeal from Board action on international routes." (Pet., p. 14a).

Judge McGowan dissented, on the ground that the public interest should encompass which of the competing applicants can render the best and cheapest service, and this factor can only be explored in a comparative hearing (Pet., pp. 21a-22a).

Following the Court's decision, petitioners filed a petition for rehearing en banc which was denied by all members of the Court of Appeals, with the exception of Judge Washington, who did not participate (R. 2045a). The Court by order dated December 29, 1964, granted the petitioners' motion for a stay pending application for a writ of certiorari, provided that the petition be filed within fifteen days from the date of the order.

ARGUMENT

I. The Decision of the Court of Appeals Was Correct

1. The decision of the Court of Appeals for the District of Columbia Circuit confirms the unbroken administrative practice of the Civil Aeronautics Board for the past twenty-six years. The Federal Aviation Act of 1958 and its predecessor the Civil Aeronautics Act of 1938 have continued in effect the provisions of law cited by petitioners substantially unchanged since 1938. Until the motion filed below by petitioner Braniff Airways, Inc., with the Civil Aeronautics Board, the issue of *Ashbacker*[3] had never been raised in connection with foreign air carrier applications before the Board. This void occurred notwithstanding the unending

[3] Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

march of *Ashbacker* petitions filed in various domestic route cases since 1947.

Thus while the basic contention of petitioners in the instant case is novel, its novelty springs from the mental ingenuity of the petitioners rather than from any inherent newness in the factual or legal situation. Petitioners also stress the importance of the question presented. Here again, the question derives importance only because of petitioners' attack on a practice of long-standing, which if overthrown would certainly produce chaotic conditions in international aviation. In this respect the attack is not unlike an attack on the doctrine of consideration in contract law.

The reason that the Board and its bar have treated foreign air carrier route applications as being on a different footing than domestic route cases is that the statutory system is different in the two lines of cases. In essence, rival applicants in a domestic route case are citizens of the United States, each subject to the same controls, each seeking to serve the United States public, varying primarily only in their ability to serve that public. Comparative consideration promotes public as well as private interest.

Foreign carriers have rarely sought to justify their applications on the grounds of service to the United States public. Respondent Lufthansa is no exception. Its primary objective is to serve German commerce. It has long served that commerce in the Germany-New York market, and in filing its application, which is the subject of this litigation, to extend its route beyond New York to South America, it had no thought of filing a competing application with those of petitioners.

It could not if it would. There is no doctrine of "freedom of the airs" as there is freedom of the seas,

and international airlines need specific authorization from every country they would serve before a route can be opened. In general, these authorizations are secured by bilateral air transport agreements, wherein each government strives to obtain the most advantageous routes for its own carrier or carriers, granting no more than necessary to the other country to assure the bargain.

The primary bargain is the reciprocal exchange of routes between the two bargaining countries. Since, however, many international airline routes touch points in several countries, bilateral agreements usually make provision as a secondary matter for the entire route, including segments which lie wholly between foreign points for the carrier concerned. As to these segments the practice has been to grant limited traffic rights rather than complete freedom to serve.

The United States-German bilateral agreement is typical of this practice. Both Germany and the United States grant reciprocal routes between the territories of the two countries, followed by grants of routes "and beyond" to large geographical areas of the world. (See *supra,* pp. 3-4). With respect to third country traffic, the capacity of each nation's carriers is limited and is to be related to the traffic demand between the home country of the carrier and the third country rather than between the country granting the right and the third country.

Specifically, the limitation which will apply to Lufthansa's carriage of traffic between New York and Latin America (Article 10 of the Agreement, *infra,* pp. 12a-13a) reads as follows:

> "The right to embark or disembark on such services international traffic destined for or coming

> from third countries . . . shall be subject to the general principle that capacity should be related:
>
> a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;
>
> b) to the requirements of through airline operation; and
>
> c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services."

Thus the bilateral agreement, which is the source of Lufthansa's claim, itself limits the extent to which Lufthansa can serve the United States public in the route extension to South America.

2. In addition to the third country traffic disabilities agreed to by Germany in the bilateral agreement, Lufthansa also is confronted with a number of infirmities and limitations imposed upon foreign carriers by United States authority. Thus:

The Board is directed to promote "adequate, economical, and efficient service by [U.S. citizen] air carriers". The Board has no promotional duties of any kind regarding foreign air carriers. Section 102(c), Federal Aviation Act, 49 U.S.C. 1302(c).

The Federal Aviation Act of 1958 gives United States flag carriers the assurance that no term, condition, or limitation in a license shall restrict the right of such a carrier to add to or change schedules, equipment, accommodations, or facilities for performing the authorized transportation. Section 401(e)(4), Federal Aviation Act, 49 U.S.C. 1371(e)(4). Not only is there no similar guarantee of freedom for foreign air carriers, but the bilateral agreement expressly

frowns on operation of too great capacity by them. The Board incorporates by reference in the foreign carrier's license all terms of the applicable bilateral agreements.

The Board may exempt U.S. flag carriers from the provisions of Title IV (economic provisions) of the Federal Aviation Act in certain circumstances without hearing. There is no possibility for such an exemption in the case of foreign carriers. Section 416(b)(1), Federal Aviation Act, 49 U.S.C. 1386(b)(1).

A United States flag carrier may not be deprived of its license by revocation except for intentional failure to comply with the economic provisions of the Federal Aviation Act or an order, rule, or regulation issued under those provisions, or of a term, condition, or limitation of the certificate. Section 401(g), Federal Aviation Act, 49 U.S.C. 1371(g). Such a protection attracts investors. There is no corresponding limitation regarding the foreign air carrier's license, and the Board is specifically authorized to revoke the foreign air carrier's permit "whenever it finds such action to be in the public interest". Section 402(f), Federal Aviation Act, 49 U.S.C. 1372(f).

A United States flag carrier is entitled to the payment of subsidy by the Civil Aeronautics Board. Section 406(b), Federal Aviation Act, 49 U.S.C. 1372(b). A foreign carrier can look to the United States Government for no such aid.

Travel regulations of the Bureau of the Budget restrict U.S. government travel on foreign airlines, and direct that such government travel be generally accomplished on United States flag carriers. Standardized Government Travel Regulations, Section 3.10, Bureau of the Budget Circular A-7. (App. A, p. 10a, *infra*).

A foreign air carrier may not own a United States registered aircraft and may not record the ownership of his foreign registered aircraft in the United States Recording System. Sections 501(a), 503(a)(1), Federal Aviation Act, 49 U.S.C. 1401(a), 1403(a)(1).

Finally, a foreign air carrier does not have the United States Government to negotiate traffic rights for it with third countries.

From the point of view of the Civil Aeronautics Board a foreign carrier would be an inadequate substitute for a U.S. citizen carrier. The whole internal corporate life of a foreign carrier is governed by its home country, and the controls which the Board exercises over citizen air carriers as to records and accounts, consolidations, mergers, acquisitions of control, interlocking relationships and the like are outside its direct reach in the case of foreign carriers. Sections 407, 408, 409, Federal Aviation Act, 49 U.S.C. 1377, 1378, 1379.

In the event of emergency, the foreign airline becomes subject to the needs of its own country's national defense effort, and the commerce and defense effort of the United States would perforce be subordinated to the needs of the carrier's home country.

On every score the foreign carrier is not competitive with the United States citizen carrier as an instrumentality of the United States to carry out its policies.

The major respect in which licensing a foreign air carrier serves the public interest of the United States is through the reciprocal routes the United States obtains for its carriers either through bilateral agreement or through comity. Obviously if the United States were unable to carry out its bilateral commit-

ments and refused to grant the route it had undertaken to grant, the reciprocal benefits it obtains through such agreements would soon vanish. In order to obviate any such result Congress specified in Section 1102 of the Act that the Board, in exercising and performing its powers and duties under the Act, do so consistently with any obligation assumed by the United States in any treaty, convention or agreement that may be in force between the United States and any foreign country.

Bilateral Air Transport Agreements, including the United States-German agreement, specifically require the grant of operating permission to the carrier *designated by* the other country. This effectively precludes the choice of a different carrier from the one designated. If such other carrier were selected as superior, the bilateral agreement would have to be denounced or renegotiated (see letter from Secretary of State R. 2085). This brings into consideration the fact that the true contest is not between petitioners and Lufthansa as applicant herein, but between petitioners and the route exchange as a whole in the United States-German agreement.

It is futile to attempt to compare the merits of the United States citizen applicants as *carriers* with the value of a *route* already granted to other United States carriers in a different part of the world, or with future benefits which might be missed because of United States inability to enter into a binding international agreement of this nature. These are public rights, and there is no evidence whatever that Congress intended to pit them against the private interest of a carrier to be selected for a route. As the Court of Appeals said: "But neither our obligations under

bilateral Agreements nor the motives for including them are subjects for comparative hearing (Pet., p. 13a).

3. The Court of Appeals in its opinion below specifically did not reach the question of economic mutual exclusivity, on which petitioners' *Ashbacker* argument rests. Examination of the question reveals a fatal flaw in petitioners' argument. The petitioners cite as the foundation of their case the following quotation from the Board's order instituting the United States-South American *Route Case*:

> "Not only do these services rendered by non-U.S. flag carriers dilute the potential economic support for the services of the U.S. carriers, but also they bring into question the need for point-to-point duplication of such services." (J.A. 56)

Not so quoted but immediately preceding the above is the following:

> "Prior to the decision in the *Latin American Case, supra,* Pan American and Panagra operated in competition with three foreign air carriers. Today, 19 South American foreign air carriers are authorized to serve the United States-South America market. There has also been an increase in service within South America by local carriers." (J.A. 56)

These 19 South American carriers, like petitioners, each have primary traffic rights between their home countries and the United States. As noted earlier, p. 4, Lufthansa has only secondary entitlement to this traffic since for Lufthansa it is third country traffic.

At the time the South American proceeding was instituted, Lufthansa had not filed its petition, although

entitled to do so since 1955 when the United States-German agreement was signed. The Board made no mention of possible Lufthansa competition, but said with respect to the services of the 19 South American carriers that they brought into question the need for point-to-point duplication of the U.S. flag services in South America. In short, regardless of the earlier need[4] for point-to-point competition between U.S. flag carriers, the benefits of competition were now being furnished by the 19 South American carriers. Thus the thrust of the Board's preliminary finding that foreign air carrier services might obviate the need for duplication of citizen air carrier services was not that foreign air carriers rendered competition between U.S. carriers uneconomic, but that they made such competition unnecessary in the public interest.[5]

Consequently, while service by Lufthansa might conceivably have an impact on the revenue of the 20-odd other carriers serving the South American market, such impact neither adds to nor detracts from the Board's tentative conclusion that the point-to-point competition previously supplied by U.S. carriers only may no longer be necessary in the public interest.

---

[4] The declaration of policy of the Federal Aviation Act of 1958 and of the Civil Aeronautics Act of 1938 included a policy endorsing—"Competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." Federal Aviation Act, Sec. 102(c), 49 U.S.C. 1302(c).

[5] There is no indication that the addition of one or more foreign carriers to the 19 in existence would in any way alter the Board's thinking. On the contrary, the Board's staff study on which the order was based specifically contemplated the addition of more foreign carriers (J.A. 67).

II. There Is No Conflict in Precedent

The decision below was not in conflict with any decisions of any other courts of appeal, any applicable decisions of this Court, nor indeed with the procedure "normally applied" by the Civil Aeronautics Board. There is thus no conflict for this Court to resolve.

III. The Order Comes Within the Ambit of Presidential Review and Judicial Review Is Barred

The Court of Appeals based its principal holding on the fact that because petitioners were not entitled to comparative consideration, the Board's order denying it was not a final order and therefore not reviewable. Jurisdiction is also barred by Section 1006(a) of the Federal Aviation Act. This section specifically prohibits review of "any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this Act." In *Chicago and Southern Airlines* v. *Waterman S.S. Corporation,* 333 U.S. 103 (1948), this Court declined to review a Board order denying a *citizen* carrier application for an overseas route because, although not literally barred by Section 1006(a), it was issued in a case which was for ultimate Presidential determination. This Court did not restrict its holding to orders emanating only after Presidential action. Rather, this Court stated that orders not submitted to the President "are not mature and are therefore not susceptible to review at any time" (333 U.S. at 110). Procedural orders which are issued in matters requiring ultimate Presidential determination have been denied review in the Court of Appeals under Section 1006(a) and the *Chicago and Southern Airlines* case. *British Overseas Airways Corp.* v. *Civil Aeronautics Board,* 113 App. D.C. 76, 304 F. 2d 952 (1962); *United States Overseas Airlines*

v. *Civil Aeronautics Board*, 95 App. D.C. 363, 222 F. 2d 303 (1955). The rationale of the *Chicago and Southern Airlines* and *British Overseas Airways Corp.* cases were relied on by Judge Wright as an additional grounds for dismissing the petitions for review, and constitute an independent basis for support of the result reached by the Court below.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 29, 1965

APPENDIX A

Pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, et seq., in addition to the pertinent provisions printed on pages 1a-4a of the Petition, read as follows:

Definitions

Sec. 101. As used in this Act, unless the context otherwise requires—

. . .

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation: *Provided,* That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

. . .

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

• • •

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401. . . .

(e)(4) No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require; except that the Board may impose

such terms, conditions, or limitations in a certificate for supplemental air transportation when required by subsection (d)(3) of this section.

. . .

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

. . .

Permits to Foreign Air Carriers

Permit Required

Sec. 402. . . .

Terms and Conditions of Permit

(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require.

Authority to Modify, Suspend, or Revoke

(f) Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, cancelled, or revoked by the Board

whenever it finds such action to be in the public interest. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, modification, amendment, suspension, cancellation, or revocation of a permit.

• • •

Rates for Transportation of Mail

Authority to Fix Rates

Sec. 406. (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same.

Rate Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, (1) the condition that such air carriers may hold and operate under certif-

icates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; (2) such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (3) the need of each such air carrier (other than a supplemental air carrier) for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

. . .

Accounts, Records, and Reports

Filing of Reports

Sec. 407. (a) The Board is empowered to require annual, monthly, periodical, and special reports from any air carrier; to prescribe the manner and form in which such reports shall be made; and to require from any air carrier specific answers to all questions upon which the Board may deem information to be necessary. . . .

Disclosure of Stock Ownership

(b) Each air carrier shall submit annually, and at such other times as the Board shall require, a list showing the names of each of its stockholders or members holding more than 5 per centum of the entire capital stock or capital, as the case may be, of such air carrier, ...

. . .

Form of Accounts

(d) The Board shall prescribe the forms of any and all accounts, records, and memoranda to be kept by air carriers, ...

Inspection of Accounts and Property

(e) The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; . . . .

Consolidation, Merger, and Acquisition of Control

Acts Prohibited

Sec. 408. (a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier, and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged

in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

. . .

Prohibited Interests

Interlocking Relationships

Sec. 409. (a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stock-

holder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

. . .

* * *

Inquiry Into Air Carrier Management

Sec. 415. For the purpose of exercising and performing its powers and duties under this Act, the Board is empowered to inquire into the management of the business of any air carrier and, to the extent reasonably necessary for any such inquiry, to obtain from such carrier, and from any person controlling or controlled by, or under common

control with, such air carrier, full and complete reports and other information.

Classification and Exemption of Carriers

Sec. 416.

. . .

Exemptions

(b)(1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

. . .

• • •

Registration of Aircraft Nationality

Registration Required

Sec. 501 (a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1108 of this Act) to operate or navigate within the United States any aircraft not eligible for registration: *Provided,* That aircraft of the national-defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Administrator. The Administrator may, by regulation, permit

the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Administrator may prescribe.

. . .

* * *

Recordation of Aircraft Ownership

Establishment of Recording System

Sec. 503. (a) The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, civil aircraft of the United States;

. . .

* * *

The Department of State

Sec. 802. The Secretary of State shall advise the Administrator, the Board, and the Secretary of Commerce, and consult with the Administrator, Board, or Secretary, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services.

* * *

Judicial Review of Orders

Orders of Board and Administrator Subject to Review

Sec. 1006. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals

for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

. . .

* * *

Pertinent provisions of the Standardized Government Travel Regulations, Bureau of the Budget Circular No. A-7 read as follows:

3.10 *Use of American airplanes.*

a. The term "American airplane," as used in this subsection, means an airplane registered under the laws of the United States but excluding those operating under certificates or permits held by foreign airlines.

b. As a general rule, employees shall use American airplanes where travel is performed by commercial air transportation between the United States and a foreign country or between foreign countries . . . .

c. Where the use of foreign airplane is authorized or approved under b, above, the reason therefor is to be entered on, or attached to, the travel order or other authorizing document, or travel voucher.

APPENDIX B

Pertinent provisions of the Air Transport Agreement between the Federal Republic of Germany and the United States of America, TIAS 3536 (in addition to the pertinent provisions printed on pages 5a-6a of the Petition) and the full Exchange of Notes pursuant thereto read as follows:

ARTICLE 4

Each contracting party reserves the right to withhold or revoke the operating permission provided for in Article 3 of this Agreement from an airline designated by the other contracting party in the event that it is not satisfied that substantial ownership and effective control of such airline are vested in nationals of the other contracting party, or in case of failure by such airline to comply with the laws and regulations referred to in Article 5 hereof, or in case of the failure of the airline or the government designating it otherwise to perform its obligations hereunder, or to fulfill the conditions under which the rights are granted in accordance with this Agreement.

ARTICLE 5

(1) The laws and regulations of one contracting party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft utilized by the airline or airlines designated by the other contracting party, and shall be complied with by such aircraft upon entering or departing from and while within the territory of the first contracting party.

(2) The laws and regulations of one contracting party relating to the admission to or departure from its territory of passengers, crew, or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on

behalf of such passengers, crew or cargo of the other contracting party upon entrance into or departure from, and while within the territory of the first contracting party.

* * *

ARTICLE 8

There shall be a fair and equal opportunity for the airlines of each contracting party to operate on any route specified in accordance with paragraph (2) of Article 2 of this Agreement.

ARTICLE 9

In the operation by the airlines of either contracting party of the air services over the routes described in accordance with paragraph (2) of Article 2 of this Agreement, the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly the services which the latter provide on all or part of the same routes.

ARTICLE 10

(1) The air services made available to the public by the airlines operating under this Agreement shall bear a close relationship to the requirements of the public for such services.

(2) It is the understanding of both contracting parties that services provided by a designated airline under the present Agreement shall retain as their primary objective the provision of capacity adequate to the traffic demands between the country of which such airline is a national and the countries of ultimate destination of the traffic. The right to embark or disembark on such services international traffic destined for or coming from third countries at a point or points on the routes specified in accordance with paragraph (2) of Article 2 of this Agreement shall be applied in accordance with the general principles of

orderly development to which both contracting parties subscribe and shall be subject to the general principle that capacity should be related:

(a) to traffic requirements between the country of origin and the countries of ultimate destination of the traffic;

(b) to the requirements of through airline operation; and

(c) to the traffic requirements of the area through which the airline passes after taking account of local and regional services.

* * *

ARTICLE 12

(1) Consultation between the competent authorities of both contracting parties may be requested at any time by either contracting party for the purpose of discussing the interpretation, application, or amendment of the Agreement or Route Schedule. Such consultation shall begin within a period of sixty (60) days from the date of the receipt of the request by the Department of State of the United States of America or the Ministry of Foreign Affairs of the Federal Republic of Germany as the case may be.

(2) Should agreement be reached on amendment of this Agreement such amendment shall become effective when it has been approved in accordance with the procedure set forth in Article 17 of this Agreement.

(3) Should agreement be reached on amendment of the Route Schedule, such agreement shall become effective on the date of an exchange of diplomatic notes in accordance with the procedure provided in paragraph (2) of Article 2 for the initial establishment of the Route Schedule.

(4) A frequent exchange of ideas will take place between the aeronautical authorities of the two parties in order to achieve close cooperation in all matters concerning the present Agreement.

ARTICLE 13

(1) Except as otherwise provided in this Agreement, any dispute between contracting parties relative to the interpretation or application of this Agreement which cannot be settled through consultation shall be submitted for an advisory report to a mixed commission of three members, one to be named by each contracting party, and the third to be agreed upon by the two members so chosen, provided that such third member shall not be a national of either contracting party. Each of the contracting parties shall designate a member within two months of the date of delivery by either party to the other party of a diplomatic note requesting settlement of a dispute; and the third member shall be agreed upon within one month after such period of two months.

(2) If either of the contracting parties fails to designate its own member within two months, or if the third member is not agreed upon within the time limit indicated, either party may request the President of the International Court of Justice to make the necessary appointment or appointments by choosing the member or members.

(3) The contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. Each contracting party shall bear the expenses arising out of the activity of its member as well as one half of the expenses arising out of the activity of the third member.

* * *

ARTICLE 16

Either of the contracting parties may at any time notify the other of its intention to terminate the present Agreement. Such a notice shall be sent simultaneously to the International Civil Aviation Organization. In the event such communication is made, this Agreement shall terminate one year after the date of its receipt, unless by agree-

ment between the contracting parties the notice of intention to terminate is withdrawn before the expiration of that time. If the other contracting party fails to acknowledge receipt, notice shall be deemed as having been received fourteen (14) days after its receipt by the International Civil Aviation Organization.

* * *

DEPARTMENT OF STATE
WASHINGTON

July 7, 1955

The Honorable
Albrecht von Kessel,
Charge d'Affaires ad interim
of the Federal Republic
of Germany

Sir:

I refer to paragraph 2 of Article 2 of the Air Transport Agreement between the United States of America and the Federal Republic of Germany, signed on July 7, 1955.

In the negotiations which have been conducted in connection with the above-mentioned agreement, it has been agreed that air services may be operated in accordance with the following route schedule.

ROUTE SCHEDULE

A. An airline or airlines designated by the Government of the United States of America shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the Federal Republic of Germany at the points specified in this paragraph:

1. From the United States of America via intermediate points to Hamburg and beyond to points in Europe north and east of the Federal Republic of Germany.

2. From the United States of America via intermediate points to Dusseldorf-Cologne/Bonn, Frankfort, Stuttgart and Munich and beyond to points in Europe east and southeast of the Federal Republic of Germany and beyond.

3. From the United States of America via intermediate points to Frankfort and beyond to points in Europe south and southeast of the Federal Republic of Germany and beyond to North Africa, the Near East and beyond.

B. An airline or airlines designated by the Government of the Federal Republic of Germany shall be entitled to operate air services on each of the air routes specified via intermediate points, in both directions, and to make scheduled landings in the United States of America at the points specified in this paragraph:

1. From the Federal Republic of Germany via intermediate points to Boston, New York and Philadelphia and beyond to points in the Caribbean Sea and beyond to South America.

2. From the Federal Republic of Germany via intermediate points to Chicago.

3. From the Federal Republic of Germany via intermediate points to San Francisco or Los Angeles.*
*Selection of the terminal point in the United States of America to be determined by the Federal Republic of Germany at a later date.

C. Points on any of the specified routes may at the option of the designated airline be omitted on any or all flights.

I should be very grateful if you would inform me of the concurrence of the Government of the Federal Republic of Germany in the foregoing route schedule.

Accept, Sir, the renewed assurances of my high consideration.

/s/ Herbert Hoover, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 824

PAN AMERICAN-GRACE AIRWAYS, INC., AND BRANIFF AIRWAYS, INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., AND MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 7a–23a) and the order of the Civil Aeronautics Board (Pet. 24a–26a) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. 27a) was entered on October 30, 1964, and a timely petition for rehearing *en banc* was denied on December 11, 1964 (R. 2045–A). The petition for a writ of certiorari was filed on January 13, 1965. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board is required to consider in a comparati hearing, and make simultaneous recommendatior to the President concerning the grant or denial of, applications for international air routes filed by foreign air carriers pursuant to international agreement, and those filed by citizen air carriers for the same air route, in light of the different statutory provisions and considerations involved in the disposition of such applications.

2. If comparative consideration and simultaneous recommendations are required when grant of a foreign carrier application would preclude economic operations by a citizen carrier seeking authority to serve the same route, whether petitioners have established economic mutual exclusivity with respect to the foreign carrier application here involved.[1]

STATUTE INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*, are set forth in Appendix A, *infra*, pp. 17–26.

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[1] In addition, a jurisdictional question is presented which was not reached by the court below—whether Section 1006 of the Federal Aviation Act, barring judicial review of "any order in respect of any foreign air carrier subject to the approval of the President," precludes review of the present interlocutory procedural order entered in a proceeding in which the final order would be covered by Section 1006. See pp. 15–16, *infra*.

STATEMENT

The operation of international air routes depends upon the exchange of reciprocal operating rights between nations. In the case of the United States, these rights for the most part are set forth in executive agreements (so-called "bilaterals") entered into with the other nations involved, and pursuant to which each nation designates its carrier or carriers to operate the routes specified therein. However, neither a foreign nor a citizen carrier may conduct common carrier operations to and from the United States until authorized by the Board to do so after notice and hearing on its application. Section 402 of the Federal Aviation Act (*infra,* p. 20) governs applications by foreign carriers, Section 401 (*infra,* p. 19) governs applications by citizen carriers, and the ultimate disposition of both types of application for foreign operations is committed to the President by Section 801 (*infra,* p. 22). *C. & S. Air Lines* v. *Waterman Corp.,* 333 U.S. 103. Section 1006(a) (*infra,* p. 23) withholds jurisdiction from the courts of appeals to provide review of "any order in respect of any foreign air carrier subject to the approval of the President," and in *Waterman, supra,* this Court held that review could not be had of an order approved by the President granting and denying applications of citizen carriers.

Section 802 (*infra,* p. 22) requires the Secretary of State to consult with the Board with respect to the negotiation of agreements "with foreign governments for the establishment * * * of * * * air routes and services," and Section 1102 (*infra,* p. 24) requires the

Board to act "consistently with any obligation assumed by the United States in any [effective] treaty, convention, or agreement." Nonetheless, the Board does not consider that it is required to recommend issuance of a foreign carrier permit to the President merely because there is an agreement therefor. Rather, Section 402(b) provides that the "Board is empowered to issue such a permit if it finds that" the foreign "carrier is fit, willing, and able" and that the "transportation will be in the public interest." The Board accordingly permits interested citizen carriers to intervene in foreign permit proceedings, and to adduce evidence in opposition to the application on any public interest ground. Its findings with respect to such grounds for opposition are included in its decision which is transmitted to the President for his approval.

However, the existence of a bilateral agreement represents a *prima facie* public interest factor pointing to the grant of the application of the carrier designated by the foreign government to operate the route, and a strong showing would be required to warrant a recommendation to the President by the Board that the application should be denied or the bilateral denounced. See *British Overseas Airways, Foreign Permit Amendment,* 29 C.A.B. 583. Further, since the foreign nation designates the carrier, there is no rivalry between applicants for the same award under the bilateral. Accordingly, foreign air carrier permit applications normally are heard separately and on an expedited basis, and the principal issue in the event of contest is whether the overall

public interest requires a recommendation to the President for denial despite the existence of the bilateral.[2] This nation's selection of the United States carrier or carriers to operate the routes provided for in bilateral agreements is made in the form of a certificate of public convenience and necessity issued pursuant to Section 401 with the approval or at the direction of the President, and, where more than one United States carrier seeks a certificate for the same route, the applications normally are heard together. The Board does not, however, hear the applications of foreigners and citizens in the same proceeding, and has never deemed such applications to be rival ones in the sense of requiring comparative consideration in a single proceeding under the rule of *Ashbacker Radio Co.* v. *Federal Communications Commission,* 326 U.S. 327.

The bilateral agreement between the United States and Germany, entered into in 1955 (7 U.S.T. & O.I.A. 527), provides for U.S. routes to and through Germany to points beyond, and American carriers have heretofore been accorded rights thereunder. Similarly, provision is made for routes from Germany to the United States "and beyond to points in the Carib-

[2] The procedures of the other nations in granting reciprocal operating rights to our carriers ordinarily are far less formal and time-consuming than are the procedures employed by this government pursuant to Section 402. Accordingly, one of the reasons why foreign air carrier permits are heard on an expedited basis is to avoid delays which are the source of irritation to the foreign governments, which could lead to retaliatory action, and which would impair our ability to negotiate effective exchanges of air routes. See the letter from the Secretary of State, Appendix B, *infra*, pp. 27–30.

bean Sea, and beyond to South America" (*id.* at 557). On March 10, 1964, Lufthansa filed with the Board the application here involved (J.A. 5, 7) requesting that its route from Europe to New York be extended in accordance with the bilateral from New York to Santiago, Chile, via points in Jamaica, Ecuador, and Peru. Petitioners, who conduct operations along the west coast of South America, sought and were granted leave to intervene in the proceedings on the Lufthansa application (J.A. 44).[3] Braniff also filed with the Board a motion to defer action until after the Board's pending *United States-Caribbean-South America Investigation,* Docket No. 12,895 (the *Route Investigation*), or, alternatively, to consolidate the Lufthansa application into that proceeding. The *Route Investigation* is a complex reexamination of the pattern of United States flag services between the United States and South America, and involves difficult questions as to the number and identity of the United

[3] The present pattern of United States flag service to South America consists of operations by Pan American World Airways over routes from New York and Miami to Rio de Janeiro and Buenos Aires, primarily via the east coast of South America; by Panagra from the Canal Zone to Buenos Aires via the west coast of South America; and by Braniff from Miami to Rio de Janiero and Buenos Aires, also via the west coast. By interchange with other United States carriers, Panagra and Braniff provide through one-plane service from New York and Miami to the South American points served by them.

States carriers to operate to South America and the routes to be flown by them.[4]

The order instituting the *Route Investigation* (Order E–17289, J.A. 54) suggested that the present pattern of service by three United States carriers to South America was not required. Rather, the desirable situation was indicated to be one in which two independent United States carriers operate from the mainland—one via the east coast of South America, and the other via the west coast, serving the present routes of Panagra and Braniff in South America from Miami and New York. The Board also pointed out that there were some 19 South American foreign carriers authorized to operate to the United States, that these services and the ones conducted by them in South America diluted the potential economic support for operations by United States carriers, and that the existing United States flag operations are "marginal economically." (J.A. 56.)

Braniff and Panagra have filed applications for the suggested New York-Miami-West Coast route, and the Braniff motion contended that comparative considera-

[4] Following the institution of the *Route Investigation* (in which hearings are scheduled to begin in April 1965), this Court entered its decision in *Pan American World Airways* v. *United States*, 371 U.S. 296, holding that resolution of the question of whether Pan American and Grace should be permitted to control Panagra was a matter for the Board to determine rather than the courts. This question is the subject of a separate Board investigation (*Panagra-Pan American-Grace Investigation*, Docket No. 14,641). Hearings therein are not expected to commence until the beginning of 1966. An ultimate determination of the United States carrier route pattern to South America cannot be expected for some time.

tion of the Lufthansa application with its proposal was required by the *Ashbacker* principle since a grant of the Lufthansa application might preclude a grant of one or more applications by United States carriers. The Board denied the motion, finding, *inter alia,* that "[a]ssuming, *arguendo,* that the *Ashbacker* Doctrine is applicable to this type of situation, there is no showing that the Braniff and Lufthansa applications are mutually exclusive as a matter of economics" (Pet. 25a). Rather, the Board pointed out that Lufthansa's transportation of so-called "fifth freedom" traffic between New York and South America would be limited by the capacity provisions of the bilateral agreement, in that the carrier's capacity between the U.S. and South American market must be tailored to the traffic demands between Germany and the South American points in question.[5] Hence, the operation would be a "sharply restricted" one, and not "primarily designed to accommodate the needs of New York-South America traffic." Also, the Board found that the public interest aspects of the Lufthansa application could be assessed without reference to the *Route Investigation,* and that deferral of proceedings would be inconsistent with the policy of giving expedited treatment to such foreign applications.

The court of appeals dismissed the petitions for review for want of jurisdiction. The majority opinion pointed out that the Board's order was a proce-

[5] "Fifth freedom" traffic for any carrier is traffic which does not originate or terminate at points in the carrier's homeland.

dural one ordinarily not subject to immediate review (Pet. 10a). It held that the petitioners were not entitled to obtain review on grounds of denial of a present procedural right because they "are not * * * entitled to an *Ashbacker* hearing with Lufthansa" (Pet. 11a) in view of the "different considerations" applicable to the disposition of that application and those of the petitioners in the *Route Investigation.* The court stated that the issues in the *Route Investigation* involve public interest factors which "are primarily economic" (Pet. 13a), whereas the Lufthansa application involves "the policy and obligations of the United States set forth in the bilateral Agreements." The court concluded that "neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings," and hence did "not reach the issues of mutual exclusivity" (*id.*).

The Board had pointed out to the court that petitioners were free to urge on the basis of evidence that the Lufthansa application should be denied or deferred because of impact on the *Route Investigation,* and that the Board's evaluation of any such contentions would be set forth in its opinion to be transmitted to the President. The court held (Pet. 13a) that "the avenue open to petitioners through their permitted intervention in the Lufthansa case before the Board cannot now be said by us to be so restricted that petitioners will be precluded from making available to the Board, and through the Board to the President, such matters affecting the public

interest as will meet the requirements of due process of law."[6]

Judge McGowan dissented (Pet. 14a), being of the view that the statute did not make *Ashbacker* inapplicable and that the Board was required to afford petitioners an opportunity in a comparative hearing "to make the affirmative case in support of their own applications" to demonstrate that they could "furnish a better and cheaper service than the foreign carrier" (Pet. 22a), and thus to persuade the Board that it should recommend to the President denunciation of the international agreement (Pet. 20a–21a). He believed that the petitioners' opportunity to urge deferral or denial of the Lufthansa application before the Board in the foreign carrier's separate proceeding was an inadequate alternative (Pet. 16a, 22a).

ARGUMENT

The court of appeals correctly held that Lufthansa's application for an international air route, filed pursuant to international agreement, could be considered by the Board apart from the Board's protracted in-

[6] Judge Wright concurred in the majority opinion written by Judge Fahy (Pet. 14a). He was of the further view that the petitions for review constituted an attempt to circumvent the prohibition contained in Section 1006 against judicial appeal from the President's disposition of the Lufthansa application. He also agreed with the position expressed below by the Secretary of State that the delays occasioned through acceding to the petitioners' views would frustrate executive action with respect to this nation's contract obligation to the West German government embodied in the outstanding bilateral agreement, and stated that "[i]t was precisely to prevent this type of embarrassment to the conduct of our foreign affairs that the Congress denied judicial appeal from Board action on international routes" (*id.*).

vestigation of the pattern of U.S. flag air carrier service involving in part the same route. Petitioners can fully protect their interests by participating in the Lufthansa proceeding. And any other result would have serious adverse impact upon our international air relations. Further review by this Court is not warranted.

1. As the court below held, the "considerations [which] bear upon Lufthansa's application and those of petitioners" are so "different" (Pet. 11a) as to preclude any requirement of comparative hearing. The licenses sought are issued under different statutory provisions (Lufthansa—Section 402; petitioners—Section 401), and there is no rivalry between Lufthansa and petitioners either in the sense that they are candidates for selection on the basis of comparative ability, or in that the licenses would be "mutually exclusive" under the *Ashbacker* case,[7] *i.e.*, that the grant of one will compel the denial of the other in terms of conventional licensing criteria. If our carriers are to operate abroad, the carriers of other nations must be permitted to operate to this nation. This elementary principle of reciprocity constitutes the foundation of our foreign air transportation system, and this nation seldom grants a foreign air carrier permit for any purpose other than to obtain or retain rights for our carriers. As found below (Pet.

[7] *Ashbacker Radio Co.* v. *Federal Communications Comm'n*, 326 U.S. 327, required comparative consideration betwen physically "mutually exclusive" applications for radio licenses. As petitioners point out, the same rule has been applied to require comparative hearing of conflicting applications by domestic air carriers for the same route.

12a–13a), the selection of which American carrier or carriers should operate to South America involves "primarily economic" considerations, whereas disposition of the Lufthansa application "involves Presidential consideration of our international relations with Germany as they arise with respect both to Lufthansa and American domestic carriers operating abroad." In other words, our government may agree to grant routes to a foreign air carrier despite economic considerations which point in the opposite direction, solely because of reciprocal desires on our part or other foreign policy factors. Hence, "comparative considerations, bearing primarily upon economics, would do little to dilute the public interest factor which perhaps weighs most heavily, * * * the policy and obligations of the United States set forth in the bilateral Agreements" (Pet. 13a).

The fact that the Aviation Act's overall statement of policy (Section 102, *infra*, p. 18) lists the same public interest factors for Board consideration, "among other things," in disposing of applications by foreign and citizen carriers affords no basis for concluding that, because *Ashbacker* has been held applicable to Section 401 applications, it perforce must be applied to such applications *vis-à-vis* Section 402 ones. As the court below recognized (Pet. 12a–13a), the "public interest has many facets," and Section 102 vests broad discretion in the Board. The Act itself recognizes the critical differences in considering foreign air carrier applications, for it provides (Section 1102, *infra*, p. 24) that the Board shall exercise its powers "consistently with any obligation assumed by

the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country * * *." Contrary to petitioners' argument (Pet. 10), we do not contend that Section 1102 overrides the Act's public interest criteria. Rather, Section 1102 embodies a critical facet of the public interest which distinguishes foreign and domestic carrier applications as a matter of law. The decision below recognizes that the international commitments by this nation and the benefits to the entire air transportation system embodied in a bilateral agreement constitute important public interest factors which properly are taken into account by the Board in processing an application under Section 402, and that the established procedure under which a citizen carrier may oppose a foreign application before the Board on any public interest ground, and before the President through the Board, satisfies all statutory and due process requirements.

2. In his concurring opinion below, Judge Wright stressed another section of the Act distinguishing foreign air carriers—Section 1006 (*infra,* p. 23), which excludes from judicial review "any order in respect of any foreign air carrier subject to the approval of the President". The purpose of this provision was to avoid "embarrassment to the conduct of our foreign affairs" (Pet. 14a), a point which was spelled out in detail by the letter of the Secretary of State reprinted as Appendix B to this brief, *infra,* pp. 27–30. The result of ordering a comparative hearing in this case would be to consolidate Lufthansa's request with a complicated and lengthy proceeding about the pat-

tern of United States flag air service to South America, and the choice of the best United States carriers for such service. Not only are the issues far different, but the protracted delay would indeed embarrass our international relations.

In contrast, petitioners' interests do not require a comparative hearing. As the court correctly determined (Pet. 13a), the permission granted to petitioners to oppose the Lufthansa application in the Board's proceeding constitutes a sufficient opportunity to urge to the President through the Board any relevant economic considerations militating against a grant, and satisfies any due process requirements. There is no contention here that the President will be unaware of petitioners' position or of any economic factors which they may urge. Thus, if considerations of national interest dictate the denial of Lufthansa's application, the withholding of action upon it until the American flag pattern is determined, or a remand to the Board for more information, the President can be expected to so recognize and to act in appropriate fashion. This is a matter, we submit, which the Act "subjects to presidential, rather than judicial review" (*Pan American World Airways* v. *United States,* 371 U.S. 296, 310). It is not the function of the judiciary to give or compel "advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control." *C. & S. Air Lines* v. *Waterman Corp.,* 333 U.S. 103, 113.

3. Even if *Ashbacker* applied, and comparative hearing would be required on mutually exclusive ap-

plications filed by foreign and domestic air carriers, petitioners have failed to show that a grant of the Lufthansa application will in fact compel a denial of, or seriously prejudice, their applications. The court of appeals did not reach this point (Pet. 13a). The Board's determination was to the contrary (Pet. 25a) because the German bilateral requires Lufthansa's capacity to be tailored to the traffic demands between Germany and the South American points involved, rather than permitting unrestricted operations designed to accommodate New York-South America traffic. Also, the numerous foreign carrier operations already being conducted over the route, and the fact that considerations other than traffic ones will weigh heavily in the determination of proper American flag pattern, make tenuous indeed any assumption that a grant of the *Lufthansa* application will affect the outcome of the *Route Investigation* one way or the other.

4. Finally, there is a serious jurisdictional obstacle to review of petitioners' claim for a consolidated hearing, not reached by the lower court. Under Section 1006, the final order in the proceeding on Lufthansa's application is excepted from the statutory judicial review. In one case, the court below dismissed an *Ashbacker* claim when the proceedings involved citizen applications subject to Presidential decision, on the ground that the controversy related to matters which were for the President's determination and hence not reviewable under *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103. See *United States Overseas Air lines* v.

Civil Aeronautics Board, 222 F. 2d 303 (*C.A. D.C.*).[8] Foreign air carriers call into play the statutory exception and review should be barred *a fortiori*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] In an earlier case involving citizen air carriers, the *Ashbacker* claim was denied, as here, because there was no showing of any deprivation of procedural right. *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 777 (C.A. D.C.).

Since *Waterman*, the government has suggested, with respect to review of orders approved by the President, that review may be had, after the President has acted, on the limited question of whether the President and the Board have exceeded their constitutional and statutory authority. See *Alaska Airlines* v. *Pan American World Airways*, 321 F. 2d 394 (C.A. D.C.); *British Overseas Airways Corp.* v. *Civil Aeronautics Board*, 304 F. 2d 952 (C.A. D.C.). No such claim is, or could be, made in this case.

APPENDIX A

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, as amended, 49 U.S.C. 1301, *et seq.*):

TITLE I—GENERAL PROVISIONS

DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act unless the context otherwise requires—

* * * * *

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

* * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * *

DECLARATION OF POLICY: THE BOARD

SEC. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs

of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * *

TITLE II—CIVIL AERONAUTICS BOARD: GENERAL POWERS OF BOARD

* * * * *

General Powers and Duties of the Board

GENERAL POWERS

SEC. 204. [72 Stat. 743, 49 U.S.C. 1324] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

* * * * *

TITLE IV—AIR CARRIER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

CERTIFICATE REQUIRED

SEC. 401. [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the

Board authorizing such air carrier to engage in such transportation.

* * * * *

ISSUANCE OF CERTIFICATE

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

* * * * *

PERMITS TO FOREIGN AIR CARRIERS

PERMIT REQUIRED

SEC. 402. [72 Stat. 757, 49 U.S.C. 1372] (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

ISSUANCE OF PERMIT

(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air

transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest.

APPLICATION FOR PERMIT

(c) Application for a permit shall be made in writing to the Board, shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

NOTICE OF APPLICATION

(d) Upon the filing of an application for a permit the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a permit. Such application shall be set for public hearing and the Board shall dispose of such application as speedily as possible.

TERMS AND CONDITIONS OF PERMIT

(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(f) Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, canceled, or revoked by the Board whenever it finds such action to be in the public interest. Any

interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, modification, amendment, suspension, cancellation, or revocation of a permit.

TRANSFER OF PERMIT

(g) No permit may be transferred unless such transfer is approved by the Board as being in the public interest.

* * * * *

TITLE VIII—OTHER ADMINISTRATIVE AGENCIES

THE PRESIDENT OF THE UNITED STATES

SEC. 801. [72 Stat. 782, 49 U.S.C. 1461] The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

THE DEPARTMENT OF STATE

SEC. 802. [72 Stat. 783, 49 U.S.C. 1462] The Secretary of State shall advise the Administrator, the Board, and the Secretary of Commerce, and consult with the Administrator, Board, or Secretary, as appropriate, concerning the negotiations of any agreement with foreign govern-

ments for the establishment or development of air navigation, including air routes and services.

* * * * *

TITLE X—PROCEDURE

Conduct of Proceedings

Sec. 1001. [72 Stat. 788, 49 U.S.C. 1481] The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. No member of the Board or Agency shall participate in any hearing or proceeding in which he has a pecuniary interest. Any person may appear before the Board or Agency and be heard in person or by attorney. The Board, in its discretion, may enter its appearance and participate as an interested party in any proceeding conducted by the Administrator under title III of this Act, and in any proceeding conducted by the Administrator under title VI of this Act from which no appeal is provided to the Board. Every vote and official act of the Board and the Agency shall be entered of record, and the proceedings thereof shall be open to the public upon request of any interested party, unless the Board or the Administrator determines that secrecy is requisite on grounds of national defense.

* * * * *

Judicial Review of Orders

ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, ex-

cept any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

TITLE XI—MISCELLANEOUS

* * * * *

International Agreements

Sec. 1102. [72 Stat. 797, 49 U.S.C. 1502] In exercising and performing their powers and duties under this Act, the Board and the Administrator shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided,* That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

* * * * *

FOREIGN AIRCRAFT

SEC. 1108. [72 Stat. 798, 49 U.S.C. 1508] (a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

(b) Foreign aircraft, which are not a part of the armed forces of a foreign nation, may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States and only if such navigation is authorized by permit, order, or regulation issued by the Board hereunder, and in accordance with the terms, conditions, and limitations thereof. The Board shall issue such permits, orders, or regulations to such extent only as it shall find such action to be in the interest of the public: *Provided, however,* That in exercising its powers hereunder, the Board shall do so consistently with any treaty, convention, or agreement which may be in force between the United States and any foreign country or countries. Foreign civil aircraft permitted to navigate in the United States under this subsection may be authorized by the Board to engage in air commerce within the United States except that they shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within

the United States. Nothing contained in this subsection (b) shall be deemed to limit, modify, or amend section 402 of this Act, but any foreign air carrier holding a permit under said section 402 shall not be required to obtain additional authorization under this subsection with respect to any operation authorized by said permit.

* * * * *

APPENDIX B

SECRETARY OF STATE,
Washington, July 1, 1964.

DEAR MR. ATTORNEY GENERAL: It has come to the attention of the Department of State that the Court of Appeals for the District of Columbia Circuit has recently issued an order staying the proceedings of the Civil Aeronautics Board in the application for amendment of a foreign air carrier permit to authorize a route granted in a bilateral agreement between the United States and the Federal Republic of Germany. The Court's order arose out of a denial by the Civil Aeronautics Board of motions of two United States carriers—Braniff and Panagra—to postpone consideration of the application of Lufthansa to extend its transatlantic services beyond stated points in the United States to points in the Caribbean Sea and in South America. The Civil Aeronautics Board had granted Panagra and Braniff leave to intervene in the procedings on the Lufthansa application, but had denied the motion to defer consideration of the Lufthansa application until after conclusion of the United States-Caribbean-South American investigation—the so-called *South America Route case.*

We are informed that the Court of Appeals will hear the case on the merits in September, with decision later in the fall. We are further informed that hearings on the *Route case*—a major proceeding involving the structure of United States flag air operations south of the United States—will not commence until the beginning of 1965 and that a final decision by the Board, with approval by the President, can-

not reasonably be expected before sometime in 1966. Thus, if the stay order of the Court of Appeals is permitted to remain in effect, the hearing on the Lufthansa application would be postponed for a number of months. If the decision of the Court on the merits were that hearings on the Lufthansa application must be deferred until conclusion of the *Route case* or must be consolidated with that case, the result would be to postpone the hearings on Lufthansa's application for at least two years.

It is our view that any substantial delay in the processing of Lufthansa's application, whether for a period of months or years, will severely compromise our international aviation relations and will impair our ability to negotiate effective exchanges of air routes with other countries. Doubt would be cast on our reliability in complying with the obligations set forth in our bilateral agreements; the value of route grants by the United States to foreign carriers would be significantly reduced; and the operations of our carriers over routes granted by foreign countries would be subjected to dilatory or other retaliatory measures.

Under our system of bilateral air transport agreements, the United States obligates itself to grant operating permission to the carrier of the other contracting government if that carrier can qualify before the Civil Aeronautics Board and if it meets certain conditions set forth in the agreement. In accordance with these arrangements, the United States Government has maintained a consistent policy of separate and expeditious treatment of foreign air carrier applications pursuant to a bilateral agreement. The Civil Aeronautics Board has never linked the grant of foreign air carrier permits to proceedings involving the certification of United States flag carriers. The Civil Aeronautics Board can of course

conclude that service over a route granted in the bilateral agreement would not be in the public interest. But this would require a holding, approved by the President, that the international agreement itself is not in the public interest and that steps should be taken to withdraw from the agreement or to modify it. So long as the agreement remains in effect, the United States cannot, in our view, be put in the position of telling a foreign country with which we have an international agreement that the question of whether the United States will comply with the agreement must be deferred for a period of years, pending consideration of long-range plans for operations by United States flag carriers. In short, linking the foreign air carrier applications to independent proceedings concerning United States carriers would effectively prevent the United States from complying with its international obligations in the aviation field. While a deferral for a period of months, resulting from the stay order, would not be as serious as a delay of several years, the adverse effect upon our international aviation relations will nonetheless be significant.

In this connection, I should like to emphasize the reverse side of the coin, that is the importance to United States carriers of securing prompt authorization to operate in foreign countries over routes negotiated in international agreements. We have consistently maintained, where necessary by diplomatic representations, that there should be no undue delay in granting operating permission for United States carriers over routes negotiated in a bilateral agreement. We have already received a strong diplomatic protest from the Federal Republic of Germany in the present case, and we could anticipate similar protests, possibly followed by retaliatory action, by

other countries in the event the Court of Appeals decision were upheld and applied to other situations.

The United States has a network of bilateral agreements with over 50 countries, each one reflecting a delicately balanced exchange of economic benefits. We should be careful not to upset these balances. I therefore urge that you make a strong effort to secure reversal of the order of the Court of Appeals in this case. In the alternative, I would urge that you pursue the suggestion of the Civil Aeronautics Board, whereby at least the initial phases of the administrative proceedings could go forward, pending full consideration on the merits by the court.

I would appreciate it if you would keep me advised of the further proceedings in this case.

Sincerely yours,

/s/ DEAN RUSK.

The Honorable ROBERT F. KENNEDY,
Attorney General.

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Supreme Court of the United States

OCTOBER TERM, 1964

PAN AMERICAN-GRACE AIRWAYS, INC., and BRANIFF AIRWAYS, INC., *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., and MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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February 1965

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REPLY BRIEF FOR PETITIONERS

I

For reasons quite understandable in view of the unquestionable novelty and importance of the question presented in the petition, respondents in their briefs in opposition go to the merits. Their discussion of the

merits is wholly unconvincing that the decision below is correct beyond the kind of doubt that would ordinarily move this Court to take in hand a question of federal law that it had not resolved. More than that, their discussion of the case serves to point up the importance of the question presented by these petitioners. Indeed, the briefs in opposition make clear that on the view of respondents, including the Civil Aeronautics Board itself, the decision below has the most significant and unsettling implications for the law governing disposition by the Board and the President of applications for foreign air carrier permits, implications that go even beyond the question here whether such permits can be granted without domestic carriers having been heard on competing, mutually exclusive applications.

Respondents state the point in various ways, but the gist of their principal argument is this: Where a foreign air carrier applies for authority to operate between specific named points, United States and foreign, and it has been designated by its government pursuant to an international agreement that describes in the vaguest of terms a route into which the specific route applied for can be fitted, the Civil Aeronautics Board has practically no choice but to recommend to the President granting of the application or denunciation of the agreement.

To make this argument respondents must read out of this country's international air transport agreements a provision common to all of them, including the Executive Agreement between the United States and West Germany involved here. That provision carries the dignity of a Presidential declaration to Congress that its inclusion is deliberate and important and it means just what it says.

Article 3 of the United States-German Agreement provides that an airline or airlines designated by one country "may be required to qualify before the competent aeronautical authorities of" the other country, "under the laws and regulations normally applied by those authorities, before being permitted to engage in the operations contemplated by this Agreement." Article 1(a) of the Agreement defines "aeronautical authorities" in the case of the United States as the Civil Aeronautics Board. There are comparable provisions in all United States international agreements providing for the reciprocal exchange of commercial air transport rights. In 1946 President Truman in a message to Congress said of such agreements:

> "Naturally, agreements of this nature to which the United States is a party are consistent with the requirements of the Civil Aeronautics Act, are valid under its terms, and fully protect the public interest. Under these agreements, before foreign air carrier permits are issued by the United States to foreign airlines, they must qualify under the provisions of the Civil Aeronautics Act [now the Federal Aviation Act]."[1]

President Truman's understanding accords with that of the sponsors of the bill that became the Civil Aeronautics Act of 1938. In answer to a congressman's

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[1] 92 Cong. Rec. 6661, 6662 (1946), quoted in 40 Ops. Att'y Gen. 451, 452 (1946). In the cited opinion the Attorney General said that he concurred in what he understood to be the position of the Department of State that "the jurisdiction of the Civil Aeronautics Board in connection with the granting of permits is not affected by any of the civil aviation agreements which have been concluded, and that the Board in each case must still decide whether the applicant carrier is a suitable airline for performance under the requested permit and whether the issuance of the permit would meet the other requirements of the statute." *Id.* at 453.

question two of the sponsors stated that it would not be possible for the Secretary of State to negotiate a binding agreement that might supersede the powers of the Board to pass upon permit applications. *Hearings on H.R. 9738 Before the House Committee on Interstate and Foreign Commerce,* 75th Cong., 3d Sess. 41 (1938).

There is no doubt, then, that consistently with the terms of the United States-German Agreement, Lufthansa must prove its case under Section 402 of the Federal Aviation Act before it is entitled to a permit to operate a New York-Caribbean-South American route. Section 402(b) provides that the Board may issue a permit only if it finds both that the applicant is fit and that the transportation proposed would be in the public interest. Contrary findings—a finding, for example, that the proposed transportation would not be in the public interest—on the basis of which the Board would recommend denial of an application, would not be in derogation of the agreement but within its clear contemplation.

Nevertheless, respondents say, the very existence of the agreement to a very large extent defines what is in the public interest. Thus, the Board says that "the existence of a bilateral agreement represents a *prima facie* public interest factor pointing to the grant of the application of the carrier designated by the foreign government to operate the route" (CAB Br. in Opp. p. 4), and that "the international commitments by this nation and the benefits to the entire air transportation system embodied in a bilateral agreement constitute important public interest factors which properly are taken into account by the Board in processing an application under Section 402 . . ." (*id.* p. 13). Lufthansa

says that "the true contest is not between petitioners and Lufthansa as applicant herein, but between petitioners and the route exchange as a whole in the United States-German agreement." (Lufthansa Br. in Opp. p. 15). The Secretary of State is of the view that a conclusion by the Board that Lufthansa's proposed service is not in the public interest "would require a holding, approved by the President, that the international agreement itself is not in the public interest and that steps should be taken to withdraw from the agreement or to modify it." (CAB Br. in Opp. p. 29). And both respondents quote with approval from the opinion of the court below a statement that "neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings. . . ." (CAB Br. in Opp. p. 9; Lufthansa Br. in Opp. pp. 15-16).

Petitioners are not asking for any such inquiry into the wisdom of the Executive Agreement or the motives for concluding it. Nor do they seek to have the agreement denounced. They merely seek the opportunity for a meaningful hearing in which there may be developed an evidentiary record on the basis of which the Board can recommend and the President decide whether, if there is not room for all three carriers on the route, their services or Lufthansa's will better serve the public interest and the public convenience and necessity. Only in this way, they believe, can the public interest be protected as President Truman said it was by international air transport agreements.

Petitioners are at a loss to find in the text of the Executive Agreement or in any section of the Federal Aviation Act a provision placing upon them some extraordinary burden to show that Lufthansa's opera-

tions, even though they would preclude the certification of one or both of petitioners, are inimical to the public interest so as "to warrant a recommendation to the President by the Board that the application should be denied or the bilateral denounced." (CAB Br. in Opp. p. 4).

More particularly, they do not find any such burden imposed by Section 1102 of the Act, on which respondents heavily rely. Section 1102 is a general direction to the Board and to the Administrator of the Federal Aviation Agency to perform consistently with the international agreements of this country the functions each of them is charged with under the various provisions of the Act. Section 1102 does not on its face define the public interest as used in Section 402 or qualify the factors that the Board is directed by Section 102 to consider both as being in the public interest and in accordance with the public convenience and necessity.[2] Very probably, as we said in our petition, Section 1102 has the effect of eliminating, in the case of an applicant designated by a foreign government pursuant to an agreement, the discretion the Board would otherwise have to refuse a permit to a qualified foreign air carrier applicant whose service would be in the public interest. (Pet. pp. 9-10). It may also have the effect of requiring that any permit issued by the Board to Lufthansa allow (not forbid) Lufthansa to meet the needs of local traffic between the United

[2] The Board early in its career decided in a case in which there was an international agreement that did not specify the route applied for that "public interest" as used in § 402 of the Act "is not a mere general reference to public welfare, but has a direct relation to definite statutory objectives," namely those specified in what was then § 2 and is now § 102 of the Act. Canadian Colonial Airways, Ltd., 3 C.A.B. 50, 56 (1941).

States and South America in accordance with Article 10(2)(c) of the Agreement.[3]

In any event, only this Court can settle the question now mooted whether, despite the terms of Article 3 of the Agreement, as clearly explained by President Truman, and of Sections 102 and 402 of the Act, the phrase public interest as used in Section 402 means something different from what it means in any other proceeding under the statute when an applicant for a permit under that section is a carrier designated by a foreign government pursuant to an agreement.

This question of law has recurrently troubled the Board, and Board members have not been of one mind. In *British Overseas Airways Corp.*, 29 C.A.B. 583 (1959), the issue was not competing applications but the impact of a significant amendment to a foreign air carrier's permit upon existing services of domestic carriers. The amendment was contemplated by an executive agreement. The Board granted the foreign carrier's application despite its own finding that $7,300,000 in annual revenues would be diverted from United States carriers. In doing so, it said that "if an affected U.S. carrier demonstrated that the economical consequences of a route exchange would be disastrous to its system, or that the basic agreement was improvident, then the Board might take the necessary steps to recommend renunciation of the bilateral." *Id.* at 593. In the view of a concurring member, a clear case had been made for denying the application as not in the public interest.[4] He recom-

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[3] See pp. 9-10, *infra*.

[4] "If there was ever a case where the Board should exercise its purported independent power to find that a route granted in a bilateral is not in the public interest, it is this one." 29 C.A.B. at 596 (Member Hector, concurring).

mended that the Board forthrightly state that it would recommend the granting of any application by a carrier designated by a foreign government pursuant to an executive agreement. *Id.* at 594-98. The Chairman of the Board, in response to the concurring Member, said that the statute requires that the Board evaluate "foreign permit applications in light of conventional public interest considerations," which he specified as "economic considerations" and which, he said, must be viewed "in light of the bilateral." *Id.* at 594.

It is for this Court to decide whether the public interest under Section 402 is determined by the existence of a bilateral agreement or whether—what practically amounts to the same thing—only a showing, which no United States carrier has ever been able to make, that would justify denunciation of the agreement is sufficient to warrant denial of a designated foreign carrier's application; or whether, alternatively and as the Chairman of the Board said in the *BOAC* case, the Board is bound to consider conventional public interest factors in every case arising under Section 402. The opportunity for making the decision is provided by our petition. If the Board is meaningfully to evaluate the public interest questions raised by Lufthansa's application, so that the Board may give the President the "advice and information that we are required, under the statute, to give him and which he, under the statute, has a right to expect from us," 29 C.A.B. at 594 (Chairman Durfee, concurring), it can do so only by a contemporaneous comparison of the Lufthansa application with the mutually exclusive applications of petitioners.

II

Lufthansa in particular and the Board also urge that Lufthansa's service will not be competitive with the services that petitioners seek authority to provide because under the Agreement Lufthansa must gear its capacity to the demands of traffic between Germany and South America moving by way of New York and not to the demands of traffic between New York and South America.

We have already noted that capacity controls are not effective. (Pet. p. 12 n.4). We would point out further that the traffic flow between New York and South America is such that service is measured in flights per week, not per day, so that the two large capacity jet round trips that Lufthansa proposes initially to operate (J.A. 34) will make a substantial addition to the seats available to transport local New York-South American passengers.

Moreover, Lufthansa's paraphrase of the capacity provision of the Agreement (Lufthansa Br. in Opp. p. 11) is incomplete, as the quotation in Lufthansa's brief in opposition (*id.* pp. 11-12) shows. The relevant article, Article 10, provides in paragraph (2) that the right to carry traffic to and from Caribbean and South American countries is subject to the general principle that capacity should be related to (a) traffic requirements between Germany and such countries, (b) the requirements of through airline operations and (c) "the traffic requirements of the area through which the airline passes [*i.e.*, the area between New York and the Caribbean and South America] after taking account of local and regional services." Article 10,

then, clearly contemplates that Lufthansa *may* provide service for the benefit of New York-South America passengers subject only to the requirement, so vaguely stated as to be difficult to enforce even if there were a disposition to enforce it, that it take account of local and regional services. Quite obviously, it is not the handful of passengers to and from Germany who will choose to fly by way of New York rather than taking advantage of Lufthansa's direct service between Germany and South America that will support Lufthansa's two weekly jet roundtrips. And, if Lufthansa is awarded a permit before petitioners' applications for certificates are passed upon, the only local or regional services provided by United States flag carriers that Lufthansa, in the best of faith, would have to take into account in determining its capacity would be the existing services, which are interchange services, with their recognized disadvantages and awkwardnesses.

III

As we suggested in our petition would probably happen, respondents in their briefs in opposition have themselves raised the important question whether Section 1006(a) of the Act, precluding judicial review of "any order in respect of any foreign air carrier subject to the approval of the President," should be extended to cover any otherwise reviewable order entered in a proceeding in which there may ultimately be an order subject to Presidential approval. (CAB Br. in Opp. pp. 15-16; Lufthansa Br. in Opp. pp. 18-19).

We have stated our views on this question in our petition. (Pet. pp. 15-16). Here we would add that the Board has introduced further confusion and em-

phasized the unsettled nature of the law in this important area by its statement that, since the decision in *Chicago & Southern Airlines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1947), "the government has suggested, with respect to review of orders approved by the President, that review may be had, after the President has acted, on the limited question of whether the President and the Board have exceeded their constitutional and statutory authority." (CAB Br. in Opp. p. 16 n.8). Contrary to the Board's further statement that no such claim is or could be made in this case, petitioners' claim is that the Board has exceeded its statutory authority by denying them the hearing to which the statute entitles them. If, on the view of the Government, that question could be reviewed after the award of a permit to Lufthansa, it surely may be reviewed now, embodied as it is in an order that—as respondents do not deny—has all the elements of finality to make it reviewable.

IV

The respondents emphasize—as if it were a controlling consideration—the delay that they say would be entailed in consolidating the three applications. (CAB Br. in Opp. pp. 13-14; Lufthansa Br. in Opp. pp. 5-6). They would sacrifice a domestic carrier's right to a comparative hearing in favor of prompt action on a designated foreign air carrier's application despite the fact that Section 401(c) of the Act requires the Board to dispose of an application for a domestic carrier certificate "as speedily as possible," just as Section 402(d) requires that an application for a foreign air carrier permit be disposed of "as speedily as possible."

Judge McGowan, dissenting below, took note of this contention, saying that what was argued in substance was that the Board could not hear all three applications before making its recommendation to the President

> "because it will take too long to hear and pass upon petitioners' applications; and that the resulting delay will embarrass the President and the Secretary of State in their conduct of our relations with Germany." (Pet. p. 23a).

He answered that the doctrine of *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), appeared "to contemplate some delay as a price Congress was willing to pay for fairness." He added that the record did not show that the Board was incapable of hearing and determining the applications "with greater dispatch than has perhaps been characteristic of major route proceedings in the past." (Pet. p. 23a). We would add further that there is much in the *United States-Caribbean-South America Investigation*, in which petitioners' competing applications are to be heard, that is utterly irrelevant to the issues raised by Lufthansa's application, and the Board is perfectly capable of devising a procedure that would permit those issues to be heard and determined with dispatch but at the same time with fairness to petitioners.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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